No. 00-10666-CFY Title: William Joseph Harris, Petitioner
v.
United States

Docketed: June 18, 2001 Court: United States Court of Appeals for the Fourth Circuit

See also:
00-1790
00-7021
00-7070
00-7085
00-8082
00-10431
00-10684
00-10864
00-10895
01-5169
01-5219
01-5305
01-5346
01-5358
01-5481
01-5501
01-5526
01-5625
01-5718
01-5860

Entry	Date	Proceedings and Orders
	Jun 18 2001	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 8, 2001)
	Jun 22 2001	Waiver of right of respondent United States to respond filed.
	Jun 28 2001	DISTRIBUTED for Conference of September 24, 2001
	Jul 24 2001	Response requested. (Due August 24, 2001)
	Aug 14 2001	Order extending time to file response to petition until September 24, 2001.
	Sep 21 2001	Order further extending time to file response to petition until October 8, 2001.
	Oct 9 2001	Brief of respondent United States in opposition filed.
	Oct 18 2001	Reply brief of petitioner William J. Harris filed.
	Oct 24 2001	REDISTRIBUTED for Conference of November 9, 2001
	Nov 6 2001	REDISTRIBUTED for Conference of November 9, 2001
	Nov 14 2001	REDISTRIBUTED for Conference of November 30, 2001
	Dec 3 2001	REDISTRIBUTED for Conference of December 7, 2001
	Dec 10 2001	Petition GRANTED. limited to the following question: Given that a finding of "brandishing", as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt? SET FOR ARGUMENT March 25, 2002.

2 pp

No. 00-10666-CFY

Entry	Date	Proceedings and Orders
		**********
	Jan 23 2002	Brief amici curiae of Cato Institute, et al. filed.
	Jan 24 2002	Brief of petitioner William J. Harris filed.
	Jan 24 2002	Joint appendix filed.
	Jan 24 2002	Brief amicus curiae of Families Against Mandatory Minimums Foundation filed.
	Jan 29 2002	Motion of petitioner for appointment of counsel filed.
	Feb 1 2002	CIRCULATED.
	Feb 6 2002	Motion DISTRIBUTED. February 22, 2002 (page 3)
	Feb 15 2002	Record filed.
	Feb 21 2002	Brief amici curiae of Criminal Justice Legal Foundation filed.
	Feb 22 2002	Brief amici curiae of New Jersey, et al. filed.
	Feb 22 2002	Brief of respondent United States filed.
	Feb 25 2002	Motion for appointment of counsel GRANTED and it is ordered that William C. Ingram, Esquire, of Greensboro, North Carolina, is appointed to serve as counsel for the petitioner in this case.
	Feb 27 2002	Record filed.
	Mar 19 2002	Reply brief of petitioner William J. Harris filed.
	Mar 25 2002	ARGUED.

00-10666

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

WILLIAM JOSEPH HARRIS,
Petitioner,

v.

[redacted]
UNITED STATES OF AMERICA,
Respondent.

MOTION TO PROCEED IN *FORMA PAUPERIS*

The Petitioner, through his undersigned counsel, requests leave to proceed in *forma pauperis* in this Court pursuant to Rule 39 of the Supreme Court Rules and 18 U.S.C. § 3006A(d)(6). Petitioner was appointed counsel by the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Middle District of North Carolina pursuant to the Criminal Justice Act of 1964. No affidavit is attached inasmuch as the above-referenced courts below appointed counsel for Petitioner under the Criminal Justice Act of 1964.

Respectfully submitted, this 14th day of June, 2001.

WILLIAM C. INGRAM
Counsel for the Petitioner
First Asst Federal Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401
Telephone: (336) 333-5455

RECEIVED
JUN 18 2001

28 pp

00-10665

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2000

WILLIAM JOSEPH HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

William C. Ingram
Counsel of Record for Petitioner
First Asst. Federal Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401
Telephone: (336) 333-5455

QUESTION PRESENTED

WHETHER "BRANDISHED" AS USED IN 18 U.S.C. § 924(C)(1)(A) IS AN ELEMENT OF THE OFFENSE OR A SENTENCING FACTOR?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTIONAL GROUNDS 2

STATUTE INVOLVED IN THE CASE 3

STATEMENT OF THE CASE 4

FACTUAL BACKGROUND 5

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 21

ENTRY OF APPEARANCE AND CERTIFICATE OF SERVICE 22

APPENDIX

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 224, 118 S. Ct. 1219 (1998) 20

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348,
147 L. Ed. 2d 435 (2000) 6, 8-11, 15

Castillo v. United States,
530 U.S. 120, 120 S. Ct. 2090,
147 L. Ed. 2d 94 (2000) 18

Food and Drug Administration v. Brown & Williamson Tobacco Corp.,
529 U.S. 120, 133 120 S. Ct. 1291, 1301 (2000) 7

Jones v. United States,
526 U.S. 227, 119 S. Ct. 1215,
143 L. Ed. 2d 311 (1999) 6-8, 10-14, 16, 19

McMillan v. Pennsylvania,
477 U.S. 79, 106 S. Ct. 2411,
91 L. Ed. 2d 67 (1986) 8-10, 14, 16-20

Patterson v. New York,
432 U.S. 197, 97 S. Ct. 2319,
53 L. Ed. 2d 281 (1977) 19

United States v. Aguayo-Delgado,
220 F.3d 926 (8th Cir.),
cert. denied, 121 S. Ct. 600 (2000) 9

United States v. Carlson,
217 F.3d 986 (8th Cir. 2000),
cert. denied, 121 S. Ct. 822 (2001) 6

United States v. Floresca,
38 F.3d 706 (4th Cir. 1994) 20

United States v. Flowal,
234 F.3d 932(6th Cir. 2001) 8

United States v. Harris,
243 F.3d 806 (4th Cir. 2001) 9

United States v. Harris,
No. 00-4154 (4th Cir. March 20, 2001) 2

United States v. Harris,
No. 1:99CR191-1 (M.D.N.C., February 28, 2000) 2

United States v. Keith,
230 F.3d 784 (5th Cir. 2000) (per curiam),
cert. denied, 121 S. Ct. 1163 (2001) 9

United States v. Pounds,
230 F.3d 1317(11th Cir. 2000),
cert. denied, 121 S. Ct. 1631 (2001) 6

United States v. Ramirez,
242 F.3d 348 (6th Cir. 2001) 8

United States v. Robinson,
241 F.3d 115 (1st Cir. 2001) 8

United States v. Smith,
223 F.3d 554 (7th Cir. 2000), petition for cert. filed,
(Jan. 16, 2001) (No. 00-8082) 9

Statutes

18 U.S.C. § 924(c)(1)(A) . . . . . i, 6, 7, 11, 12, 14, 20

18 U.S.C. § 924(c)(1)(A)(i) 7

18 U.S.C. § 924(c)(1)(A)(ii) 7, 20

18 U.S.C. § 924(c)(1)(A)(iii) 7

18 U.S.C. § 2119 . . . . . 7, 12

18 U.S.C. § 3006A 22

21 U.S.C. § 841(a)(1) 4

21 U.S.C. § 841(b)(1)(C) 9

21 U.S.C. § 848 9

28 U.S.C. § 1254(1) 2

42 Pa. Const. Stat. § 9712(b) 16, 18

Miscellaneous

Fed. R. Crim. P. 29 4

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2000

WILLIAM JOSEPH HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in his case on March 20, 2001.

OPINION BELOW

The opinion of the Fourth Circuit, for which review is sought, is United States v. Harris, No. 00-4154 (4th Cir. March 20, 2001). The district court's judgment sought to be reversed is United States v. Harris, No. 1:99CR191-1 (M.D.N.C., February 28, 2000). The district court judgment is reproduced in Appendix A and the Fourth Circuit's opinion is reproduced in Appendix B.

JURISDICTIONAL GROUNDS

Judgment was rendered in the United States Court of Appeals for the Fourth Circuit on March 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THE CASE

18 U.S.C. § 924(c)(1)(A)

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime --

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

On August 31, 1999, Petitioner, William Joseph Harris, was named in a four-count superseding indictment by a grand jury in the United States District Court for the Middle District of North Carolina. Counts One and Three charged Harris with unlawful distribution of marijuana on separate dates in violation of 21 U.S.C. § 841(a)(1). Counts Two and Four charged Harris with carrying a firearm during and in relation to the marijuana offenses in violation of 18 U.S.C. § 924(c)(1).

On October 26, 1999, Harris entered a plea of guilty to Count One, one of the marijuana distribution offenses. The court granted the government's motion to dismiss Counts Three and Four. Harris then went to trial on Count Two, charging him with carrying a firearm during and in relation to the marijuana offense to which he pleaded guilty in Count One. Harris waived his right to a jury trial and was found guilty in a one-day bench trial on October 26, 1999. At the close of the government's case, Harris moved for acquittal pursuant to Rule 29, and the court denied that motion.

At sentencing, Harris argued that "brandished" is an element of a separate offense that the government failed to charge in the indictment and prove beyond a reasonable doubt at trial. The trial court ruled against Harris. Judgment was formally entered February 28, 2000. Harris filed a timely notice of appeal on February 18, 2000. The Fourth Circuit affirmed the Petitioner's conviction in a published opinion on March 20, 2001.

FACTUAL BACKGROUND

Harris, was the owner and operator of Harris Pawn Shop, a federal firearm licensee, in Albemarle, North Carolina. On April 29, 1999, Special Agent Boykin, an undercover officer with ATF, accompanied Harris' half-brother, Rodney Deaton, who was acting as a confidential informant, to Harris Pawn Shop to purchase marijuana from Harris. The pawn shop was open on all three occasions Agent Boykin dealt with Harris.

During the first transaction, Agent Boykin spent about thirty minutes in conversation in the pawn shop before negotiating the marijuana transaction. As was his habit while in the pawn shop, Harris was wearing a Taurus nine-millimeter pistol on his waist. After the transaction was completed, Deaton commented on Harris' weapon, and Agent Boykin remarked on it as well. In response, Harris explained that it used special homemade ammunition that could penetrate a cop's armored jacket and go through his heart. Uncontradicted testimony established that Harris always wore the pistol for protection while at the pawn shop, but he always left it at the pawn shop when he went home at night. The court found that it is common practice for people working at pawn shops to wear pistols.

Harris had sold marijuana to only four friends and the few people his brother brought with him, such as Agent Boykin. Harris did not always sell marijuana from the pawn shop. He most often sold it from his house. However, he never had a firearm when at home. Harris' four customers also never carried firearms. Harris only sold enough marijuana to pay for the marijuana he smoked himself.

REASONS FOR GRANTING THE WRIT

"BRANDISHED" AS USED IN 18 U.S.C. § 924(C)(1)(A) SHOULD BE INTERPRETED AS AN ELEMENT OF THE OFFENSE DUE TO THE STATUTORY CONSTRUCTION AND BECAUSE IT INCREASES THE MANDATORY MINIMUM PUNISHMENT.

In this case, the Fourth Circuit has joined the Eighth and Eleventh Circuits in finding that "brandished" and/or "discharged" are sentencing factors rather than elements of 18 U.S.C. § 924(c)(1)(A). See United States v. Carlson, 217 F.3d 986, 989 (8th Cir. 2000), cert. denied, 121 S. Ct. 822 (2001) ("[W]e conclude § 924(c)(1)(A) defines a single criminal offense for using or carrying a firearm during a violent crime, with sentencing implications if the firearm is brandished.") and United States v. Pounds, 230 F.3d 1317, 1319 (11th Cir. 2000), cert. denied, 121 S. Ct. 1631 (2001) ("We believe that the language and structure of § 924(c)(1)(A) demonstrate that Congress intended the fact of the discharge of a firearm during a crime of violence to be a sentencing factor and not an element of the § 924(c)(1)(A) offense.").

In light of the Court's recent decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), Petitioner contends that the above cases were wrongly decided, and the "brandished" clause of 18 U.S.C. § 924(c)(1)(A) is not merely a sentencing enhancement, but is an element of a separate offense that the government was required to charge in the indictment and prove beyond a reasonable doubt at trial. In Apprendi, the Court held that any statutory fact, other than a fact of prior conviction, that increases a statutory maximum sentence is an element to be pleaded and proved, not merely a sentencing enhancement. 530 U.S. at 490, 120 S. Ct. at 2362-63.

In Jones, the Court held that the provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing significantly higher penalties when "serious bodily injury" or "death" results, created separate offense elements requiring proof beyond a reasonable doubt. 526 U.S. at 252, 119 S. Ct. at 1228, 143 L. Ed. 2d 311. Their applications to this case follow.

A. Rules of statutory construction mandate that § 924(c)(1)(A)(i), "brandished," and § 924(c)(1)(A)(ii), "discharged," be read consistently.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme." Food and Drug Administration v. Brown & Williamson Tobacco Corporation, 529 U.S. 120, 133 120 S. Ct. 1291, 1301 (2000) (internal citations and quotation marks omitted). Applying this canon of statutory construction to 18 U.S.C. § 924(c) requires that subsection (1)(A)(ii), "if the firearm is brandished," and subsection (1)(A)(iii), "if the firearm is discharged," be read consistently. Therefore, either "brandished" and "discharged" are both elements of the offense or they are both sentencing factors. However, one cannot be a sentencing factor and the other an element. Accordingly, the following analysis will examine both the "brandished" subsection and the "discharged" subsection in arguing that they are elements of 18 U.S.C. § 924(c)(1)(A).

B. A sentencing factor that increases the mandatory minimum should be treated like an element.

A fact that increases the mandatory minimum punishment increases the prescribed range of penalties to which a criminal defendant is exposed, and thus, should be found to be an element of

the offense under Apprendi. Justices Stevens and Thomas indicated in Jones and Apprendi, respectively, that they believed the holding in Apprendi should be extended to statutory minimums. In addition, the Sixth Circuit recently held that Apprendi applies to statutory minimums.

1. The Court should resolve the split among the circuit courts of appeal.

The Sixth Circuit recently held that where a judge found a defendant possessed 5.2 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1), which subjected the defendant to a mandatory minimum of life in prison, the jury should have been able to determine the weight of the drugs beyond a reasonable doubt. United States v. Flowal, 234 F.3d 932, 936 (6th Cir. 2001). The Sixth Circuit expanded on Flowal in United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001). In Ramirez, the court explained that the "rights in Apprendi are triggered by the drug statute's progression of increased mandatory minimum penalties based in part on the quantity of drugs possessed." Id. at 351. Thus, the court held that "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." Id.

In the instant case, the Fourth Circuit joins the First, Fifth, Seventh, and Eighth Circuits, which have found to the contrary. See United States v. Robinson, 241 F.3d 115, 122 (1st Cir. 2001)("McMillan clearly allows a fact that triggers a mandatory minimum sentence to be found by a judge using a preponderance-of-the-evidence standard as long as the mandatory minimum does not exceed the otherwise-applicable statutory

maximum. . . ."); United States v. Harris, 243 F.3d 806, 809 (4th Cir. 2001) (declining to extend Apprendi holding to statutory minimums); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1163 (2001)("[W]e hold that a fact used in sentencing that does not increase a penalty beyond the statutory maximum need not be alleged in the indictment and proved to a jury beyond a reasonable doubt."); United States v. Smith, 223 F.3d 554, 565-66 (7th Cir. 2000), petition for cert. filed, (Jan. 16, 2001) (No. 00-8082) (increase in statutory minimums authorized by 21 U.S.C. § 848 are not increased punishment triggered by Apprendi); and United States v. Aguayo-Delgado, 220 F.3d 926, 934 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) ("Those [statutory] minimums, because they are within the statutory range authorized by § 841(b)(1)(C) without reference to drug quantity, are permissible under Apprendi and McMillan even where the drug quantity was not charged in the indictment or found by the jury. . . ."). In the interest of judicial consistency, the Court should resolve this split in circuit law.

2. Justices Stevens and Thomas asserted arguments that the Apprendi holding should extend to statutory minimums.

In Apprendi, the Court held that any statutory fact, other than a prior criminal offense, that increases a statutory maximum sentence is an element to be pleaded and proved, not merely a sentencing enhancement. 530 U.S. at 490, 120 S. Ct. at 2362-63. The Court further stated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Id. (quoting from Jones, 526 U.S. 252-53, 119 S. Ct. 1228-29, 143 L. Ed. 2d 311)

(emphasis added). Justice Stevens, in his concurring opinion in Jones, stated that "a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence. . . ." 526 U.S. at 253, 119 S. Ct. at 1229, 143 L. Ed. 2d 311 (Stevens, J., concurring).

Likewise, Justice Thomas stated in Apprendi that "if a fact is by law the basis for imposing or increasing the punishment--for establishing or increasing the prosecution's entitlement-- it is an element." 530 U.S. at 521, 120 S. Ct. at 2379 (Thomas, J., concurring). He also stated that this "common-law rule would cover the McMillan situation of a mandatory minimum sentence." Id. As explained by Justice Thomas:

> No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. . . . But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum entitles the government to more than it would otherwise be entitled. . . . Thus, the fact triggering the mandatory minimum is part of the punishment sought to be inflicted, it undoubtedly enters into the punishment so as to aggravate it, and is an act to which the law affixes punishment.

530 U.S. at 521-22, 120 S. Ct. at 2379 (internal citations and quotation marks omitted). Thus, the Court should take this opportunity to overrule McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

3. Application of the rationale underlying Apprendi leads to the conclusion that any fact that increases the statutory minimum is an element of the offense.

When a maximum sentence increases, it only increases the possible maximum sentence. However, a certain, substantial increase in a mandatory minimum sentence is a more compelling situation for finding the facts supporting the increased mandatory

minimums to be an element to be proved, than is the situation where a maximum sentence is increased, as in Apprendi and Jones. Likewise, under § 924(c), the increase in the mandatory minimum sentence for brandishing or discharging a firearm is not merely possible, but is certain. If a defendant is found to have brandished a firearm, the mandatory minimum sentence increases from five years to seven years. If a defendant is found to have discharged a firearm, the mandatory minimum sentence increases from five years to ten years.

Furthermore, it is unlikely that any defendant would ever get a sentence approaching life for a violation of § 924(c). The guideline sentence for 18 U.S.C. § 924(c) is " . . . the minimum term of imprisonment required by statute," or, in other words, the mandatory minimum. United States Sentencing Commission, Guidelines Manual, § 2K2.4(a)(2) (Nov. 1998). In addition, before a judge could depart upward from the mandatory minimum, the judge must articulate a legally permissible basis for any such upward departure. Since it is unlikely that there would be such an upward departure in most cases under § 924(c), much less a departure to anything close to the maximim sentence of life in prison, the real, certain increase in the mandatory minimum sentences is the truly meaningful increase in a sentence under that statute. Therefore, these increases in the mandatory minimum sentences under § 924(c) present an even more compelling situation to find the facts generating those mandatory minimums as an element and not a sentencing enhancement.

C. Application of the Jones statutory analysis to 18 U.S.C. § 924(c) leads to the conclusion that "brandished" and "discharged" are elements of the offense.

In Jones, the Court held that the provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing significantly higher penalties when "serious bodily injury" or "death" results, created separate offense elements requiring proof beyond a reasonable doubt. 526 U.S. at 252, 119 S. Ct. at 1228, 143 L. Ed. 2d 311. The Jones analysis applies in this case for several reasons. First, the construction of 18 U.S.C. § 924(c) is nearly identical to the construction of the carjacking statute at issue in Jones. Thus, the analysis is equally applicable. Next, both statutes call for steeply higher penalties when a further fact occurs, i.e., a weapon is brandished or discharged. Also, the Court found it important that "serious bodily injury" is treated as an offense element in other contexts. Likewise, "brandishing" and "discharging" a weapon are crimes in and of themselves in many jurisdictions and elements of well over 200 criminal statutes, including some federal statutes. Finally, like the carjacking statute at issue in Jones, the Court may determine that there is still a possibility that "brandished" and "discharge" as used in 18 U.S.C. § 924(c) were intended to be sentencing factors. If so, the canon of constitutional avoidance should resolve the issue in favor of finding that "brandished" and "discharged" were intended to be elements of 18 U.S.C. § 924(c).

1. The Jones carjacking statute and § 924(c) are structurally identical.

First, the pertinent portions of 18 U.S.C. § 924(c) and 18 U.S.C. § 2119, the statute at issue in Jones, are virtually mirror images of each other. See App. C. Each statute contains a general clause stating the conduct prohibited in an incomplete

sentence, and then a subsection of that clause provides the penalty provision. Next, each statute contains subsections providing for increased penalties under certain conditions, i.e., in the Jones carjacking statute for "serious bodily injury" or "death" and in 18 U.S.C. § 924(c) for "brandishing" or "discharging" a firearm. Because the structure of these two sections is strikingly similar, if not virtually identical, the Jones analysis by the Court of the carjacking statute is appropriately applied to 18 U.S.C. § 924(c).

In Jones, the Court noted that the "serious bodily injury" provision of the carjacking statute was contained in a separate subsection from the first section of the statute, in which the primary elements of the crime were listed, and therefore the statute "had a look" that suggested that serious bodily injury was merely a sentencing factor. 526 U.S. at 232-33, 119 S. Ct. at 1219. However, the Court concluded that this appearance was deceptive for several reasons.

2. Both the Jones carjacking statute and § 924(c) are dependant clauses that call for steeply higher penalties.

First, the serious bodily injury section of the statute at issue in Jones established "steeply higher penalties" than cases not involving serious bodily injury. 526 U.S. at 233, 119 S. Ct. at 1219. Moreover, the Jones Court noted that the "steeply higher" penalty range was conditioned on a further fact, i.e., whether serious bodily injury occurred - a fact that was just as important as the primary elements of the crime. Id. Finally, the Court noted that the serious bodily injury subsection was not really a separate section because the first clause of the statute was an incomplete sentence without the subsection. 526 U.S. at 233-34, 119 S. Ct. at 1219.

That precise analysis applies to 18 U.S.C. § 924(c). First, like Jones, the "brandished" and "discharged" subsections are not independent sections because the first clause of the statute is an incomplete sentence without the following clauses. Second, also like Jones, the further facts provided in the subsections impose a higher penalty range that makes those facts just as important as the primary elements of the crime. If a defendant is found to have brandished a firearm, the mandatory minimum sentence increases from five years to seven years, a forty percent increase. If a defendant is found to have discharged a firearm, the mandatory minimum sentence increases from five years to ten years, a one hundred percent increase. Allowing a "sentencing factor" to double the term of imprisonment would permit the sentencing factor to be the "tail which wags the dog of the substantive offense," a result discouraged by the McMillan court. See 477 U.S. at 88, 106 S. Ct. at 2417.

3. "Brandishing" a weapon or "discharging" a weapon are crimes in many jurisdictions and elements of crimes in most jurisdictions.

Next, because the text alone did not justify any confident inference as to whether the serious bodily injury language was a sentencing enhancement or an element of the offense, the Jones Court considered whether other federal statutes included "serious bodily injury" as an offense element. The Court concluded that Congress has frequently, although not always, treated "serious bodily injury" as an offense element in other contexts. 526 U.S. at 235-36, 119 S. Ct. at 1220-21. The Court also noted that serious bodily injury was often an offense element in analogous state statutes as well. 526 U.S. at 236-37, 119 S. Ct. at 1221. Finally, the Court recognized that it would be an "oddity" to find

a term to be a statutory crime with its own offense elements in one instance, and merely a sentencing consideration in another instance. 526 U.S. at 238, 119 S. Ct. at 1222. Likewise, the Apprendi Court recognized that "the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes it clear that the mere presence of this 'enhancement' in a sentencing statute does not define its character." 530 U.S. at 496, 120 S. Ct. at 2366.

Like the provisions at issue in Jones and Apprendi, "brandishing" or "discharging" a firearm or weapon are crimes and elements of crimes in both federal and state criminal statutes. Petitioner has identified four federal criminal statutes where "discharging" a firearm is an element of the offense. See App. D. However, no federal statutes were identified where "discharging" a firearm was merely a sentencing factor. In addition, "discharging" a firearm or weapon is an element of a criminal statute in almost every state and United States territory. Many United States jurisdictions have multiple statutes making the discharge of a firearm or dangerous weapon an element of the offense. In all, Petitioner identified 210 state and United States territory statutes that made discharging a firearm or weapon either a crime or an element of a crime. See App. E. Finally, Petitioner has identified eleven United States jurisdictions in which "brandishing" a firearm or a weapon is either a statutory crime in and of itself or the element of a criminal statute. See App. F. Because "brandishing" and "discharging" firearms and weapons are either crimes with their own elements or elements of a crime in almost every United States jurisdiction, judicial consistency calls

for the terms to be treated as offense elements, not merely sentencing considerations.[1]

4. The canon of constitutional avoidance resolves the conflict in favor of finding "brandished" and "discharged" are elements.

Finally, in Jones, the Court asserted that, because its analysis under the above steps left open the possibility that "serious bodily injury" was a sentencing factor, the statute nevertheless should be construed as requiring that "serious bodily injury" be charged as an offense element under the canon of constitutional avoidance. 526 U.S. 239-52, 119 S. Ct. at 1222-28. The Court concluded that treating any fact, other than a prior conviction, that increases the maximum penalty for a crime as a sentencing factor, rather than as an element of the offense, would raise concerns involving both Fifth Amendment due process and the Sixth Amendment right to a jury. 526 U.S. 243 n.6, 119 S. Ct. at 1224 n.6. Like the carjacking statute in Jones, sections 924(c)(1)(A)(i) and (ii) should be construed as elements of 18 U.S.C. § 924(c).

D. McMillan v. Pennsylvania did not hold that "brandishing" a weapon is always a sentencing factor.

In McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Court examined a provision in a Pennsylvania statute imposing a mandatory minimum sentence of five years if a defendant, who had been convicted of certain enumerated felonies, "visibly possessed a firearm during the commission of the offense." 477 U.S. at 81, 106 S. Ct. at 2413, citing 42 Pa. Const. Stat. § 9712(b) (See App. G). The Court concluded that the

[1]Petitioner has not identified any legislative history that directly speaks to the issue of whether "brandishing" was intended to be a sentencing factor or an offense element. Notably, the Court did not rely heavily on legislative history in Jones either.

provision was a sentencing enhancement, not an element of any offense. 477 U.S. at 91, 106 S. Ct. at 2419. Although McMillan initially appears to be factually similar to the instant case, upon closer inspection, the instant case is easily distinguished from McMillan.

The McMillan holding is not a precedential bar to this Court ruling that "brandished" under § 924(c) is an element of the offense, for the following reasons: First, the Court specifically stated that it was not laying down any "bright line" test regarding whether "visible possession of a firearm" is a sentencing condition or element of the offense. Second, the Pennsylvania statute specifically provided that the "visibly possessed a firearm" provision was not an element of the underlying offense. In this case, § 924(c) has no such express provision providing that "brandished" is not an element. Finally, McMillan rested on the premise "that preventing and dealing with crime is much more the business of the States than it is of the Federal Government," and the Court hesitated "to intrude upon the administration of justice by the individual States." 477 U.S. at 85, 106 S. Ct. at 2415-16. However, unlike McMillan, the statute at issue here is a federal statute, not a state statute.

1. McMillan did not establish a "bright line" rule.

The McMillan Court did not hold that "visible possession of a firearm" would always be considered a sentencing enhancement under any possible criminal statute. To the contrary, the Court specifically stated that it was not laying down any "bright line" test, and concluded that "States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of

a particular offense. . . ." 477 U.S. at 91, 106 S. Ct. at 2419 (emphasis added).

2. Unlike § 924(c), the statute at issue in McMillan did not create a new offense, but rather, the statute specifically stated that it was creating sentencing factors for a list of already existing crimes.

In Castillo v. United States, 530 U.S. 120, 125, 120 S. Ct. 2090, 2093, 147 L. Ed. 2d 94 (2000), the Court analyzed a previous version of § 924(c). Noting that the title of the entire statute was "Penalties," the Court concluded that "the section's title cannot help [interpret the statute], for Congress already has determined that at least some portion of § 924, including § 924(c) itself, creates, not penalty enhancements but entirely new crimes. . . . The title alone does not tell us which are which." Id. (internal citations omitted) (emphasis added). The revised statute at issue here is still entitled "Penalties." However, the title provides no more guidance now than it did in the original version.

Unlike § 924(c), no new criminal offense was created in the Pennsylvania statute at issue in McMillan. Rather, the Pennsylvania legislature "expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, § 9712(b), but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those [preexisting enumerated] crimes beyond a reasonable doubt." 477 U.S. at 85-86, 106 S. Ct. at 2416.

In this case, § 924(c) has no such express provision providing that "brandished" is not an element. Also, as noted above, the Court recognized in Castillo that § 924(c) does create entirely new crimes. These two distinctions make a great portion of the analysis in McMillan inapplicable to the instant case.

3. The McMillan case involved a state statute and this case involves a federal statute.

Finally, the Court stated that the McMillan case was controlled by Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). McMillan, 477 U.S. at 85, 106 S. Ct. at 2416. The Court also stated that Patterson rests on the premise "that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." 477 U.S. at 85, 106 S. Ct. at 2415-16. However, unlike McMillan, the statute at issue here is a federal statute, not a state statute. Thus, the issue of a federal entity intruding upon the administration of justice by the states is not a concern in this case.

4. The Jones analysis is more applicable to this case than the McMillan analysis.

Due to the differences between the state statute at issue in McMillan and the federal statute at issue in this case, the Jones analysis is much more applicable to this case than the McMillan analysis. As argued above, under the Jones analysis, the statutory fact of "brandished" under 18 U.S.C. § 924(c) is an element of a separate offense, and not a sentencing enhancement, because § 924(c) and the car hijacking statute in Jones are structurally identical and also because the analysis in Jones is applicable to § 924(c). So, if the car hijacking statute at issue in Jones substituted "visible possession of a firearm" for "serious bodily injury," the Court would have held that "visible possession of a firearm" under that statute was an element of an additional offense. Therefore, although "visibly possessing a firearm" was

held to be a sentencing enhancement under the statute at issue in McMillan, "visibly possessing a firearm," or the similar physical act of "brandishing a firearm," will not always be considered only a sentencing enhancement under every possible statutory scheme.

E. The error of treating an element as a sentencing factor was not harmless.

"An indictment must set forth every element of the crime that it charges." Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S. Ct. 1219, 1223 (1998). The indictment in this case did not allege the element of "brandished." The failure of an indictment to allege an essential element is not subject to harmless error analysis because it is a "structural defect in the trial mechanism." United States v. Floresca, 38 F.3d 706, 711-714 (4th Cir. 1994). Because the indictment in this case alleges only the offense elements contained in 18 U.S.C. § 924(c)(1)(A), and did not allege the "brandished" element contained in 18 U.S.C. § 924(c)(1)(A)(ii), Petitioner's sentence should be vacated, and the case remanded for resentencing.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

This the 14th day of June, 2001.

William C. Ingram
Counsel of Record for Petitioner
First Asst. Federal Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401
Telephone: (336) 333-5455

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

WILLIAM JOSEPH HARRIS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ENTRY OF APPEARANCE AND CERTIFICATE OF SERVICE

I, William C. Ingram, having been admitted to practice before the state and federal courts situated in North Carolina and before this Court, and having been appointed to represent the Petitioner, WILLIAM JOSEPH HARRIS, in the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, hereby enter my appearance in this Court with respect to this Petition for Writ of Certiorari.

I further certify that today, June 14, 2001, as counsel for Petitioner, I have served one copy of the Petition for Writ of Certiorari (complete with Appendix), and Petitioner's Request to Proceed in *Forma Pauperis* in the above-entitled case upon the Solicitor General for the United States Department of Justice, Tenth Street and Constitution Avenue, Washington, D.C., 20530, and all others required to be served.

William C. Ingram
First Asst. Federal Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401
Telephone: (910) 333-5455

RESPONSE REQUESTED

ORIGINAL

No. 00-10666

Supreme Court, U.S.
FILED
OCT 9 2001
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM JOSEPH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MARC I. OSBORNE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RECEIVED
AFTER HOURS
OCT - 9 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

21pp

QUESTION PRESENTED

1. Whether, as a matter of statutory interpretation, brandishing a firearm is an element of an offense defined by 18 U.S.C. 924(c)(1)(A)(ii).

2. Whether the district court plainly erred by failing to rule that the Constitution requires any fact that increases a defendant's statutory mandatory minimum sentence to be proved at trial beyond a reasonable doubt.

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-10666

WILLIAM JOSEPH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 243 F.3d 806.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2001. The petition for a writ of certiorari was filed on June 18, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a plea of guilty and a bench trial in the United States District Court for the Middle District of North Carolina,

petitioner was convicted of distributing marijuana, in violation of 21 U.S.C. 841(a), and of carrying a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). He was sentenced to time served (two days' imprisonment) on the distribution count and to seven years' imprisonment on the firearm offense, to be followed by concurrent terms of three years' supervised release. He was also fined $3000, and ordered to pay a $200 special assessment. The court of appeals affirmed.

1. On April 29, 1999, an undercover law enforcement officer visited petitioner's pawn shop and bought an ounce of marijuana from petitioner. Pet. App. B, 2; Presentence Report (PSR) ¶ 5. The next day the officer returned and bought 114 grams (approximately four ounces) of marijuana. During both sales, petitioner carried a 9mm Taurus handgun in an unconcealed hip holster. At one point petitioner removed the gun from its holster and told the officer that the gun was illegal because of its high-capacity magazine, and that petitioner's homemade bullets could pierce a police officer's armored jacket. Pet. App. B, 2.

2. Petitioner was indicted on two counts of distribution of marijuana, in violation of 21 U.S.C. 841, and two counts of carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. B, 2. He pleaded guilty to one distribution charge, and the court found

him guilty of the associated firearm charge after a bench trial. Id. at 2-3. The other two counts were dismissed on the government's motion. Id. at 2.

The Presentence Report determined that for purposes of sentencing petitioner should be held responsible for the equivalent of 534 grams of marijuana, resulting in a base offense level of eight under the Sentencing Guidelines. PSR ¶ 12; see Guidelines § 2D1.1(c)(16).[1] With that offense level (the PSR recommended no adjustments) in criminal history category I, the PSR recommended a Guidelines sentencing range of 0-6 months' imprisonment on the distribution count. On the firearm count, Guidelines § 2K2.4(a)(2) specifies that the Guidelines sentence for an offense under Section 924(c) is "the minimum term of imprisonment required by statute," which the PSR indicated was seven years' imprisonment. PSR ¶ 41.

At sentencing, the government argued that petitioner should be held responsible for an additional 8-12 pounds of marijuana that the evidence suggested he had sold over a six-year period, but the district court found the evidence insufficient to support

---

[1] The PSR related (¶¶ 4-10) that in addition to the 114 grams of marijuana involved in the offense of conviction, petitioner sold undercover officers an ounce (28 grams) of marijuana on April 28, 1999; another ounce on April 29; three and a half ounces of marijuana, one gram of opium, and two diazepam tablets on May 6; and a half ounce of marijuana and four grams of opium on May 18. The PSR converted the other drug quantities to marijuana-equivalents for purposes of its Guidelines calculations. PSR ¶ 12; see Guidelines § 2D1.1, comment., nn. 6, 10.

that attribution. See Sent. Tr. 26-30. The court also rejected petitioner's arguments that he should be subject to a five-year, rather than a seven-year, minimum sentence on the firearm count, both because his display of a firearm during and in relation to the drug offense did not amount to "brandish[ing]" within the meaning of Section 924(c)(1)(A)(ii), and because the government did not charge brandishing in the indictment or prove it beyond a reasonable doubt at trial. See Deft's Response to Govt's Position Concerning Sentencing Factors 3-9; Sent. Tr. 3-26. Having found that petitioner's display of the weapon met the definition of brandishing in 18 U.S.C. 924(c)(4), the court sentenced petitioner to "time served" (which the court deemed to be about two days' imprisonment) on the distribution count, and to seven years' imprisonment on the firearm count. Pet. App. A, 2; Sent. Tr. 41. The court also observed to counsel that it thought "the seven-year sentence [was] appropriate" on the facts of the case. Sent. Tr. 40. Although the court declined to specify that it would reimpose that sentence even if petitioner's argument concerning brandishing were to succeed on appeal, it made clear that if the case were remanded, the court would consider the overall sentence open for reconsideration. Id. at 38-40; see Pet. App. B, 5.

3. The court of appeals affirmed. Pet. App. B, 1-10. The court rejected (id. at 3-10) petitioner's renewed argument that,

as a matter of statutory construction, brandishing is an element of an aggravated offense defined by Section 924(c)(1)(A)(ii), which must therefore be charged in the indictment and proved at trial beyond a reasonable doubt before it may form the basis for a mandatory minimum sentence. The court also rejected (Pet. App. B, 4-6) the argument, raised in petitioner's reply brief and in a supplemental brief, that those procedural safeguards are constitutionally required under Apprendi v. New Jersey, 530 U.S. 466 (2000). The court observed (Pet. App. B, 4) that, because Section 924(c)(1) does not set a maximum penalty for any form of the offense of using or carrying a firearm during and in relation to a drug-trafficking offense, it involves only a mandatory minimum sentence, not a finding that "increases the penalty for a crime beyond [a] prescribed statutory maximum." Apprendi, 530 U.S. at 490. The court concluded that "the 'brandished' clause of [the statute] sets forth a sentencing factor that need not be charged in the indictment." Pet. App. B, 10. Because the brandishing provision "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm," the court concluded, that approach is constitutional under McMillan v. Pennsylvania, 477 U.S. 79 (1986). Pet. App. B, 4 (quoting McMillan, 477 U.S. at 87-88).

ARGUMENT

Petitioner argues principally (see Pet. i, 6-7, 12-20) that 18 U.S.C. 924(a)(1)(A), as amended in 1998 and presently in effect, is properly construed to define a base offense of using or carrying a firearm during and in relation to a drug trafficking offense (or a crime of violence), and separate, progressively aggravated offenses involving the additional elements of brandishing or discharge of the firearm. The four courts of appeals that have considered that argument have correctly rejected it. See Pet. App. B3-10; United States v. Gray, 260 F.3d 1267, 1280-1282 (11th Cir. 2001); United States v. Barton, 257 F.3d 433, 441-443 (5th Cir. 2001); United States v. Pounds, 230 F.3d 1317, 1319-1320 (11th Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1631 (2001) (No. 00-8876); United States v. Carlson, 217 F.3d 986, 987-989 (8th Cir. 2000), cert. denied, 531 U.S. 1095 (2001) (No. 00-7069); see also United States v. Sandoval, 241 F.3d 549, 551-552 (7th Cir. 2001) (weapon type, under Section 924(c)(1)(B), is a sentencing factor), petition for cert. pending, No. 01-6076 (filed July 12, 2001). There is accordingly no need for this Court to review the issue.

Section 924(c)(1)(A) provides in relevant part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm * * * shall, in addition to the punishment provided for such crime of violence or drug trafficking crime --
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Thus, the statute begins with a principal paragraph laying out the elements of an offense, ending with "shall," and followed by three numbered subsections specifying applicable sentences. That structure on its face "suggest[s] that the numbered subsections are only sentencing provisions." Jones v. United States, 526 U.S. 227, 232 (1999) (considering similar structure of 18 U.S.C. 2119); see also Pounds, 230 F.3d at 1319; Carlson, 217 F.3d at 987.

As petitioner points out (Pet. 12-16), in Jones the Court ultimately concluded that the carjacking statute at issue there, 18 U.S.C. 2119, was best construed to define a base offense and two aggravated offenses. "Apart from their initial structural similarity, however, Section 924(c)(1) and Section 2119 differ in material respects that make a different conclusion appropriate here. The present version of Section 924(c)(1) also differs critically from the earlier version of that statute that this Court interpreted in Castillo v. United States, 530 U.S. 120 (2000), where the Court held that the type of firearm used or carried was an aggravating offense element. That version of the statute provided, in pertinent part, that:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm, shall * * * be sentenced to imprisonment for five years, and if the firearm is a * * * machinegun, * * * to imprisonment for thirty years.

18 U.S.C. 924(c)(1) (Supp. V 1993).[2]

As the court of appeals recognized (Pet. App. B, 6), the most important difference between the current version of Section 924(c)(1) and either Section 2119 or the earlier Section 924(c) is that under that the present statute, the statutory maximum sentence does not depend at all on the presence or absence of an aggravating factor. Current Sections 924(c)(1)(A)(ii) (brandishing) and (iii) (discharge) provide that if the specified circumstances exist, the sentence imposed must be "not less than" a certain term of years. Those provisions accordingly impose

---

[2] The court of appeals in this case noted (Pet. App. B, 6) that in United States v. Bandy, 239 F.3d 802, 807-808 (6th Cir. 2001), the Sixth Circuit appeared to hold that weapon type is an offense element under amended Section 924(c)(1)(B). Although the Bandy opinion purports to apply the amended statute (or, rather, seems to assume that the current version is the same as the one the Court interpreted in Castillo), the crime in that case was committed before the statute was amended in 1998. Bandy was therefore correct, on its facts, in applying Castillo and remanding the case for resentencing. The Sixth Circuit has not had an opportunity to reconsider the language of the Bandy opinion in a case that actually arose under the current version of the statute. In any event, because Bandy involved firearm type, which is now addressed by Section 924(c)(1)(B), rather than brandishing or discharge of a firearm, which is addressed by the somewhat different language of Section 924(c)(1)(A), any potential conflict caused by that decision would not warrant review in this case.

statutory minimum sentences, with an implicit maximum sentence of life imprisonment for any form of the offense.

Current Section 924(c) is also structurally very different from the earlier version construed in Castillo. In that case, the Court reasoned in part that "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence, not broken up with dashes or separated into subsections." The Court noted, however, that the current version of the statute -- which was in place by the time the Court considered Castillo -- "separates different parts of the first sentence (and others) into different subsections," and it observed that the amendment was a "structural circumstance[] that [would] suggest a contrary interpretation" from the one the Court adopted with respect to the unamended language. 530 U.S. at 125.

Both Castillo and Jones also gave weight to the traditional treatment of a particular statutory factor. See Castillo, 530 U.S. at 126-127; Jones, 526 U.S. at 234-237. Although petitioner cites 11 state statutes, of various sorts, to support an argument that brandishing is a traditional offense element, see Pet. 15; Pet. App. F, his comparisons are considerably less compelling than those drawn by the Court in Jones, 526 U.S. at 235-236, between the carjacking statute and the federal robbery statutes

on which it had been modeled.[3] Moreover, Castillo already considered the specific factor and context at issue here, and explained that "[t]raditional sentencing factors often involve * * * special features of the manner in which a basic crime was carried out (e.g., that the defendant * * * brandished a gun)." 530 U.S. at 126 (citing Guidelines § 5K2.6 (authorizing upward departures for, among other things, discharge of a firearm)); see also McMillan v. Pennsylvania, 477 U.S. 79, 90-91 (1986) (suggesting that visible possession of a firearm has not historically been treated as an offense element); Pet. App. B, 10 (citing pertinent Guidelines provisions).[4]

---

[3] The Jones Court also relied, to a lesser extent, on other federal statutes and on state robbery statutes. See 526 U.S. at 235, 236-237. We note that two of the state statutes that petitioner cites do not criminalize the brandishing of a firearm. See Cal. Penal Code § 246.1; Iowa Code § 723A.1.

[4] Petitioner notes (Pet. 7) that brandishing and discharge of a firearm, the enhancing factors specified in clauses (ii) and (iii) of Section 924(c)(1)(A), should presumably both be treated either as elements or as sentencing factors. He then argues (Pet. 15; Pet. App. D, E) that discharge is traditionally an element, and that Congress must accordingly have intended that brandishing be treated as an element. The opposite inference is more plausible: Because clause (i) is indisputably a sentencing provision, and clause (ii) specifies a traditional sentencing factor (brandishing), clause (iii) is likewise best read to deal only with sentencing. In any event, Castillo's reasoning that "brandish[ing] a gun" is best construed as an example of "the manner in which a basic crime [is] carried out" applies equally to discharge of a firearm. Moreover, in support of its observation that brandishing, as a manner of carrying out a crime, was a traditional sentencing factor, the Court cited (530 U.S. at 126) Guidelines § 5K2.6. That provision authorizes upward departures where a weapon was used or possessed in the commission of an offense, and it provides in particular that "[t]he discharge of a

The legislative history of the 1998 revisions to Section 924(c)(1)(A) also indicates that Congress expected factors such as brandishing to be taken into account at sentencing, rather than to figure into the threshold determination of criminal liability. The House of Representatives described the revised statute as "provid[ing] for increased mandatory minimum sentences[,]" H.R. 344, 105th Cong., 1st Sess. 1 (1997), "provid[ing] for an increased mandatory penalty for any person who possesses, brandishes, or discharges a firearm[,]" id. at 2, and "increas-[ing] penalties for escalating egregious conduct[,]" id. at 6. See Castillo, 530 U.S. at 129-130; Jones, 526 U.S. at 237-239; Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (considering legislative history).

Furthermore, unlike the statutes at issue in Jones and Castillo, Sections 924(c)(1)(A)(ii) and (iii) do not impose "steeply higher penalties[,]" Jones, 526 U.S. at 233, which might suggest that they were intended to define separate offenses. In Jones, the relevant maximum sentence increased from 15 years' imprisonment for any carjacking to 25 years if the crime resulted in serious injury, and to life if it resulted in death. In Castillo, the version of Section 924(c)(1) that was at issue -- which specified fixed sentences, rather than sentencing ranges -- doubled the applicable sentence from five years to ten years if

---

firearm might warrant a substantial sentence increase."

the firearm used or carried was short-barreled, and raised it to 30 years if the firearm was a machinegun or was equipped with a silencer. See 530 U.S. at 127. Here, by contrast, a finding that a firearm was brandished increases the mandatory minimum penalty for a violation of the statute from five years to seven years, and a finding that the firearm was discharged increases the minimum to ten years. Furthermore, as explained above, neither finding has any effect on the statutory maximum sentence, which is life imprisonment for any form of the offense.[5]

Finally, petitioner suggests (Pet. 16) application of the principle of constitutional doubt that the Court invoked in Jones. That principle has no application where the proper interpretation of the statute is clear. See, e.g., United States v. Oakland Cannabis Buyers' Cooperative, 121 S. Ct. 1711, 1719 (2001). In any event, the constitutional question that was in

[5] Petitioner notes (Pet. 9-10) that the Sentencing Guidelines set the ordinary Guidelines sentence for a Section 924(c)(1)(A) violation at the applicable statutory minimum. He argues that, in practice, a finding that triggers an increased statutory minimum sentence is more likely to increase a defendant's actual prison time than a finding that increases the statutory maximum sentence. That argument is difficult to evaluate or refute in the abstract. In any event, neither the way the Sentencing Commission has chosen to exercise its discretion in establishing Guidelines applicable to Section 924(c) offenses, nor speculation about how often or how far district courts are likely to exercise their discretion to depart upward in such cases (see Guidelines § 2K2.4, Application Note 1), is germane to the threshold question of statutory interpretation here. Nothing in the Guidelines suggests (or could require) interpreting brandishing and discharge as anything other than statutory sentencing factors.

doubt in Jones was later resolved in Apprendi v. New Jersey, 530 U.S. 466 (2000). Cf. Pet. App. B, at 4 n.1 (Apprendi "obviate[s] the need for 'statutory interpretation'" where a fact increases the authorized punishment beyond the otherwise applicable statutory maximum). And, as discussed below, the constitutionality of the proper interpretation of Section 924(c)(1)(A), under which brandishing and discharge are sentencing factors rather than elements, is not doubtful under this Court's decision in McMillan v. Pennsylvania.

2. Relying primarily on Apprendi, petitioner also contends (Pet. 7-11) that the brandishing factor established by Section 924(c)(1)(A)(ii) should in any event be "treated like an element" of an aggravated offense. Pet. 7 (emphasis omitted). In Apprendi the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

In McMillan, this Court upheld the constitutionality of a sentencing scheme under which any person convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense. The Court reasoned

that such a sentencing scheme "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." Id. at 87-88.

Apprendi did not disturb the Court's holding in McMillan, although it made clear that that holding is limited "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." 530 U.S. at 487 n. 13. The court of appeals' reliance on McMillan to sustain petitioner's seven-year sentence, Pet. App. B, 4-6, is consistent with that limitation. Because Section 924(c)(1)(A) authorizes up to a life sentence for any violation, clause (iii)'s requirement that the court impose a seven-year sentence in specified circumstances does not "involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." Apprendi, 530 U.S. at 487 n. 13. Instead, as the court of appeals explained, that requirement, like the provision at issue in McMillan itself, "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." Pet.

App. B, 4 (quoting McMillan, 477 U.S. at 87-88 (alteration in the court of appeals' opinion)).

Since Apprendi, the courts of appeals have upheld the constitutionality of using sentencing factors that produce increased mandatory minimum sentences under 18 U.S.C. 924(c)(1). See Gray, 260 F.3d at 1281 (quoting Pounds, 230 F.3d at 1319-1320); Barton, 257 F.3d at 441 (plain-error review); United States v. Sandoval, 241 F.3d at 550-551 (firearm type) ("Apprendi is inapplicable here because convictions under § 924(c)(1)(A) [all] carry a statutory maximum sentence of life imprisonment[.]"); Pounds, 230 F.3d at 1319 & n. 1; Carlson, 217 F.3d at 988-989. The courts have also affirmed sentences imposed under the mandatory minimum sentencing provisions of 21 U.S.C. 841(b) based on a finding by the district court that triggered the minimum sentence, where the sentence imposed did not exceed the maximum authorized by statute given the findings made by the jury beyond a reasonable doubt. See, e.g., United States v. Barragan, No. 00-30335, 2001 WL 984681, at *5 (9th Cir. Aug. 29, 2001) (term of supervised release); United States v. Hitchcock, No. 00-10251, 2001 WL 951273, at *7 (9th Cir. Aug. 23, 2001); United States v. Rodgers, 245 F.3d 961, 965-968 (7th Cir. 2001), petition for cert. pending, No. 01-5169 (filed July 5, 2001); United States v. Robinson, 241 F.3d 115, 122 (1st Cir. 2001), cert. denied, No. 00-10411 (Oct. 1, 2001); United States v. Pratt, 239 F.3d 640, 646-648 (4th Cir.

2001) (term of supervised release); United States v. Williams, 238 F.3d 871, 877 (7th Cir.), cert. denied, 121 S. Ct. 2232 (2001) (No. 00-9667); United States v. McIntosh, 236 F.3d 968, 976 (8th Cir.), cert. denied, 121 S. Ct. 1964 (2001) (No. 00-1551); United States v. LaFreniere, 236 F.3d 41, 49-50 (1st Cir. 2001); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000), cert. denied, 121 S. Ct. 1163 (2001) (No. 00-8077); United States v. Aguayo-Delgado, 220 F.3d 926, 933-934 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) (No. 00-6746).

The Sixth Circuit has taken a somewhat different approach in reviewing sentences imposed under Section 841(b). As petitioner points out (Pet. 8), in United States v. Ramirez, 242 F.3d 348, 351-352 (6th Cir. 2001), that court vacated a 20-year mandatory minimum sentence that had been imposed under Section 841(b)(1)(A) and remanded for resentencing, even though the original sentence did not exceed the maximum of 30 years authorized by Section 841(b)(1)(C) for a recidivist defendant. Post-Ramirez decisions of the Sixth Circuit make clear, however, that the court recognizes the continuing authority of McMillan in cases -- such as this one -- in which a factor limits the court's sentencing discretion within the range otherwise available, without altering the maximum available penalty or creating a separate offense.[6]

---

[6] See United States v. Stafford, 258 F.3d 465, 478-479 & n.9 (6th Cir. 2001) (noting limitations of Ramirez line of cases); United States v. Garcia, 252 F.3d 838, 842-844 (6th Cir. 2001) ("Apprendi explicitly applies only in those situations where a factual determination made under a lesser standard of proof than the reasonable doubt standard 'increased the penalty for a crime beyond the [prescribed] statutory maximum.'") (quoting Apprendi, 530 U.S. at 490, and distinguishing Ramirez); United States v. Strayhorn, 250 F.3d 462, 470 (6th Cir. 2001).

Thus, although Ramirez contains broad language that could be read to apply to a statute such as Section 924(c)(1)(A), see 242 F.3d at 351 ("Aggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved."), the holding of the case has been limited to the context of the laddered penalty provisions of Section 841(b). Under that provision, a drug-quantity determination made by the district court can be seen as simultaneously raising both the statutory minimum and the theoretical statutory maximum sentence for a particular defendant. Because Section 924(c)(1)(A), unlike Section 841, does not set forth graduated maximum penalties, but instead authorizes a life sentence for any offense, nothing in the decision below contradicts that holding, or implicates the narrow circuit conflict created by the Ramirez line of cases. Compare United States v. Alvarez, Nos. 00-1285 & 00-1286, 2001 WL 1141452, at *9 (6th Cir. Sept. 28, 2001) (despite Ramirez, Apprendi is "inapplicable" where "the statutory penalties available * * * include imprisonment for life").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MARC OSBORNE
Attorney

OCTOBER 2001

IN THE SUPREME COURT OF THE UNITED STATES

HARRIS, WILLIAM JOSEPH Petitioner	)	
vs.	)	No. 00-10666
USA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by Federal Express, on this 9th day of October 2001.

WILLIAM C. INGRAM
101 SOUTH ELM STREET
SUITE 210
GREESNSBORO, NC 27401

Theodore B. Olson /m

THEODORE B. OLSON
Solicitor General
Counsel of Record

October 9, 2001

RECEIVED
AFTER HOURS
OCT - 9 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

173 Dem

Supreme Court
FILED
OCT 18 2001
CLERK

(4)

NO. 00-10666

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2001

WILLIAM JOSEPH HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO THE BRIEF IN OPPOSITION

William C. Ingram
Counsel of Record for Petitioner
First Asst. Federal Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401
Telephone: (336) 333-5455

RECEIVED
OCT 18 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

11 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

Cases ii
Statutes ii
Miscellaneous ii

ARGUMENT

A. Most circuit courts of appeals believe they are constrained by MacMillan v. Pennsylvania from extending Apprendi v. New Jersey to statutory minimums 1

B. Apprendi should be extended to statutory minimums. 1

C. The legislative history does not conclusively state that "brandishing" and "discharge" in §§ 924(c)(1)(A)(ii) and (iii) are sentencing factors 2

D. If Congress intended "brandishing" and "discharge" in §§ 924(c)(1)(A)(ii) and (iii) to be sentencing factors, then §§ 924(c)(1)(A)(ii) and (iii) are facially unconstitutional 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348,
147 L. Ed. 2d 435 (2000) 1, 2, 4, 5

Jones v. United States,
526 U.S. 227, 119 S. Ct. 1215,
143 L. Ed. 2d 311 (1999) 2, 4, 5

McMillan v. Pennsylvania,
477 U.S. 79, 106 S. Ct. 2411,
91 L. Ed. 2d 67 (1986) 1, 2

United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001) . . . 5

United States v. Garcia, 252 F.3d 838 (6th Cir. 2001) 1

United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001) 1

STATUTES

21 U.S.C. § 841(b)(1)(A) 5

21 U.S.C. § 841(b)(1)(B) 5

18 U.S.C. § 924(c)(1)(A) 2, 4

18 U.S.C. § 924(c)(1)(A)(i) 5

18 U.S.C. § 924(c)(1)(A)(ii) 2, 4, 5

18 U.S.C. § 924(c)(1)(A)(iii) 2, 4

MISCELLANEOUS

Black's Law Dictionary 233 (6th ed. 1990) 3

H.R. 344, 105th Cong., 1st Sess. 12 (1997) 3

ARGUMENT

A. Most circuit courts of appeals believe they are constrained by McMillan v. Pennsylvania from extending Apprendi v. New Jersey to statutory minimums.

As pointed out by Respondent, the courts of appeals, with the exception of the Sixth Circuit, believe they are constrained by McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986) from applying the Apprendi rationale to statutory minimums. (See Resp't. at 15-17.) However, the Sixth Circuit found that rationale was logically applicable to statutory minimums, holding that "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001). Although the Sixth Circuit has since narrowed that holding, it continues to apply the Apprendi rationale where a district court sentences at the bottom of the statutory sentencing range; thus, indicating that the court "thought itself constrained by a specific statute to impose the sentence it did." United States v. Garcia, 252 F.3d 838, 843 (6th Cir. 2001). Therefore, although the holding is narrowed, it is still in conflict with other circuits' belief that McMillan precludes all extensions of Apprendi to statutory minimums.

B. Apprendi should be extended to statutory minimums.

The Sixth Circuit is correct in its assessment that Apprendi should be extended to statutory minimums. This Court stated in Apprendi that other than the fact of a prior conviction, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. at 490, 120 S. Ct. at 2362-63 (2000)(quoting from Jones v. United States, 526 U.S. 227, 252-53, 119 S. Ct. 1215, 1228-29, (1999) (Stevens, J., concurring)) (emphasis added); (also citing Jones, 526 U.S. at 253, 119 S. Ct. at 1229 (Scalia, J., concurring) ("it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.")) In addition, both Justice Stevens and Justice Thomas have stated that the principle espoused in Jones and Apprendi apply to facts that increase the minimum permissible sentence. See Jones, 526 U.S. at 253, 119 S. Ct. at 1229, 143 L. Ed. 2d 311 (Stevens, J., concurring) ("a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence. . . .") and Apprendi, 530 U.S. at 521, 120 S. Ct. at 2379 (Thomas, J., concurring) (this "common-law rule would cover the McMillan situation of a mandatory minimum sentence.")

C. The legislative history does not conclusively state that "brandishing" and "discharge" in §§ 924(c)(1)(A)(ii) and (iii) are sentencing factors.

Respondent asserts that the "legislative history of the 1998 revisions to § 924(c)(1)(A) indicates that Congress expected factors such as brandishing to be taken into account at sentencing,

rather than to figure into the threshold determination of criminal liability." (Resp't. at 11.) However, other sections of the legislative history indicate that Congress intended brandishing and discharging to be crimes, not mere sentencing factors. The House Report of the House of Representatives repeatedly uses the words "conviction" and "charge," words associated with crimes, not sentencing enhancements. The House of Representatives stated in the House Report "[t]o sustain a conviction for brandishing or discharging a firearm, the government must demonstrate that the firearm was used 'during and in relation to' the commission of the federal crime of violence or drug trafficking crime." H.R. 344, 105th Cong., 1st Sess. 12 (1997) (emphasis added). The Report further stated "H.R. 424 also defines the term 'brandish,' for purposes of a § 924(c) charge." Id. (emphasis added). Another reference to "brandishing" as a "charge" followed, stating, "unavailability of witnesses or disputes between witness recollections would not preclude prosecutors from bringing a charge for brandishing a firearm under § 924(c)." Id. at 13 (emphasis added).

The terms "conviction" and "charge" are not used when referencing sentencing matters or, for example, the United States Sentencing Guidelines. Rather, "charge" when used in reference to a criminal case is defined as "the specific crime the defendant is accused of committing. Accusation of a crime by a formal complaint, information or indictment." Black's Law Dictionary 233 (6th ed. 1990). "Conviction" is defined as "the result of a criminal

trial which ends in a judgment or sentence that the accused is guilty as charged." Id. at 333. The references to bringing a "charge" and sustaining a "conviction" clearly indicate that Congress expected defendants to be charged in an indictment with a crime under §§ 924(c)(1)(A)(ii) and (iii), a requirement not expected for a mere sentencing factor. Thus, while Petitioner recognizes that the legislative history contains some language indicating that Congress may have intended §§ 924(c)(1)(A)(ii) and (iii) to be sentencing factors, Petitioner asserts that the legislative history is not conclusive on that point because it also contains language indicating that Congress intended §§ 924(c)(1)(A)(ii) and (iii) to be separate crimes.

D. If Congress intended "brandishing" and "discharge" in §§ 924(c)(1)(A)(ii) and (iii) to be sentencing factors, then §§ 924(c)(1)(A)(ii) and (iii) are facially unconstitutional.

Respondent asserts that Congress intended "brandished" and "discharged" of § 924(c)(1)(A) to be mere sentencing factors. (Resp't. at 10 n.4.) Assuming *arguendo* that Respondent is correct, Petitioner asserts that § 924(c)(1)(A)(ii) is facially unconstitutional and violates both the Fifth Amendment right to due process and the Sixth Amendment right to a jury under the Jones and Apprendi rationales. In Apprendi, this Court stated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. at 490, 120 S. Ct. at 2362-63

(quoting from Jones, 526 U.S. 252-53, 119 S. Ct. 1228-29, 143 L. Ed. 2d 311) (Stevens, J., concurring)) (emphasis added).

When applying this principle to § 924(c)(1)(A)(ii), a finding that the defendant "brandished" a firearm unquestionably increases the prescribed range of penalties because the defendant can no longer be sentenced to 5 or 6 years of imprisonment as was permissible under § 924(c)(1)(A)(i). The defendant must be sentenced to at least 7 years. Thus, the range of penalties is increased from 5 years to life to 7 years to life. As explained by Justice Thomas, "The mandatory minimum entitles the government to more than it would otherwise be entitled." Apprendi, 530 U.S. at 521-22, 120 S. Ct. at 2379. Therefore, if this Court finds that Congress intended for a judge to determine by a preponderance of the evidence whether the defendant "brandished" a firearm, then under the principle espoused in Jones and Apprendi, the statute cannot be saved from a constitutional attack. See United States v. Buckland, 259 F.3d 1157 (9th Cir. 2001) (21 U.S.C. §§ 841(b)(1)(A) & (B), having been previously found to be sentencing factors, are facially unconstitutional under Apprendi).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

Respectfully submitted, this the 17th day of October, 2001.

LOUIS C. ALLEN III
Federal Public Defender

WILLIAM C. INGRAM
First Assistant Federal Public Defender
North Carolina State Bar No. 9884
101 South Elm Street, Ste. 210
Greensboro, NC 27410
(336) 333-5455

No. 00-10666

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2001

RECEIVED
OCT 1 8 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, William C. Ingram, certify that as counsel of record for Petitioner, I have served an original and ten (10) copies of the Reply to the Brief in Opposition in the above-entitled case by Federal Express Overnight delivery to:

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, NE
Washington, DC 20543

and by U. S. Mail to all others required to be served.

This, the 17th day of October, 2001.

WILLIAM C. INGRAM
First Assistant Federal Public Defender
North Carolina State Bar No. 9884
101 South Elm Street, Ste. 210
Greensboro, NC 27410
(336) 333-5455

FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF NORTH CAROLINA

LOUIS C. ALLEN III
Federal Public Defender

WILLIAM C. INGRAM
First Assistant

THOMAS N. COCHRAN
JOHN A. DUSENBURY, JR.
ERIC D. PLACKE
WILLIAM S. TRIVETTE
Assistant Federal Public Defenders

ELIZABETH A. FLAGG
Research & Writing Specialist

101 South Elm Street, Suite 210
Greensboro, NC 27401
Tel. (336) 333-5455
Fax: (336) 333-5463

Branch Office
GREGORY DAVIS
Senior Litigator
251 N. Main Street
Suite 427, Federal Building
Winston-Salem, NC 27101
Tel. (336) 631-5278
Fax: (336) 631-5280

October 17, 2001

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First St., NE
Washington, DC 20543

SENT VIA FED EX PRIORITY OVERNIGHT - TRACKING NO. 826168253732

Re: William Joseph Harris v. United States of America: No. 00-10666

Dear Mr. Suter:

Regarding the above-captioned case, please find enclosed the original and ten (10) copies of our Reply To The Brief In Opposition, as well as the Certificate of Service, served separately.

If you have any questions, please do not hesitate to contact me.

Sincerely,

William C. Ingram
First Assistant Federal Public Defender

WCI/lgc
Enclosures
cc: Theodore B. Olson, Esq.
William Joseph Harris

RECEIVED
OCT 1 8
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(5)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 00-10666

In The

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
MARC I. OSBORNE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
Counsel for Respondent

WILLIAM C. INGRAM
First Assistant Federal Public Defender
Counsel of Record
Suite 210
101 South Elm Street
Greensboro, North Carolina 27401
(336) 333-5455
Counsel for Petitioner

Petition For Certiorari Filed June 18, 2001
Certiorari Granted December 10, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

285 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Indictment, filed 7/26/99	2
Superseding Indictment, filed 8/31/99	4
Transcript of Change of Plea Hearing and Bench Trial, 10/26/99	7
Position of United States with Respect to Sentencing Factors, filed 1/12/00	173
Defendant's Response to Government's Position Concerning Sentencing Factors, filed 2/7/00	198
Transcript of Sentencing Hearing, 2/17/00	210
Judgment, filed 2/28/00	255
Notice of Appeal, filed 2/18/00	267
United States v. Harris, No. 00-4154 (4th Cir. March 20, 2001)	269

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF NORTH CAROLINA

7/26/99	1	INDICTMENT as to WILLIAM JOSEPH HARRIS (1) count(s) 1,2 (rw) [Entry date 07/26/99]
8/31/99	8	SUPERSEDING INDICTMENT as to WILLIAM JOSEPH HARRIS (1) count(s) 1s, 2s, 3s, 4s (gr) [Entry date 09/01/99]
12/9/99	22	TRANSCRIPT OF CHANGE OF PLEA HEARING and BENCH TRIAL held before JUDGE WILLIAM L. OSTEEN, SR. in GSO filed in case as to WILLIAM JOSEPH HARRIS for dated of 10/26/99. Court Reporter Mary Jo Beck. (161 pgs.) (kg) [Entry date 12/10/99]
1/12/00	26	POSITION of USA re: Sentencing Factors as to WILLIAM JOSEPH HARRIS (Sealed) (kg) [Entry date 01/12/00]
2/7/00	27	POSITION of WILLIAM JOSEPH HARRIS re: Sentencing Factors as to WILLIAM JOSEPH HARRIS (Sealed) (kg) [Entry date 02/08/00]
2/18/00	29	NOTICE OF APPEAL by WILLIAM JOSEPH HARRIS (1) count(s) 2s, 1, 2s, 2, 3s, 4s appealing judgement and sentence dated 2/17/00 (cb) [Entry date 02/22/00] [Edit date 02/22/00]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	
	:	
v.	:	1:99CR191-1
WILLIAM JOSEPH HARRIS	:	(Filed Jul. 26, 1999)

The Grand Jury charges:

COUNT ONE

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS willfully, knowingly and intentionally did unlawfully distribute approximately 114 grams (gross weight) of marijuana, a Schedule I, controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

COUNT TWO

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS, during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1), did knowingly carry a firearm, that is, a 9mm Taurus semi-automatic pistol, Model PT92F, Serial Number TKE92836AFD; in violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL:

/s/ Joel Clifton Rosenquist
FOREPERSON

/s/ Steven H. Levin
STEVEN H. LEVIN
ASSISTANT UNITED STATES ATTORNEY

/s/ Benjamin H. White, Jr.
for WALTER C. HOLTON, JR.
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	SUPERSEDING
v.	:	1:99CR191-1
WILLIAM JOSEPH HARRIS	:	(Filed Aug. 31, 1999)

The Grand Jury charges:

COUNT ONE

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS willfully, knowingly and intentionally did unlawfully distribute approximately 114 grams (gross weight) of marijuana, a Schedule I, controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

COUNT TWO

On or about April 30, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS, during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1), did knowingly carry a firearm, that is, a 9mm Taurus semi-automatic pistol, Model PT92F, Serial Number TKE92836AFD; in violation of Title 18, United States Code, Section 924(c)(1).

COUNT THREE

On or about May 6, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS willfully, knowingly and intentionally did unlawfully distribute approximately 100 grams (gross weight) of marijuana, a Schedule I, controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(D).

COUNT FOUR

On or about May 6, 1999, in the County of Stanley, in the Middle District of North Carolina, WILLIAM JOSEPH HARRIS, during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, distribution of marijuana, in violation of Title 21, United States Code, Section 841(a)(1), did knowingly carry a firearm, that is, a 9mm Taurus semi-automatic pistol, Model PT92F, Serial Number TKE92836AFD; in violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL:

/s/ Joel Clifton Rosenquist
FOREPERSON

/s/ Steven H. Levin
STEVEN H. LEVIN
ASSISTANT UNITED STATES ATTORNEY

/s/ Benjamin H. White, Jr.
for WALTER C. HOLTON, JR.
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	Criminal Action No. 1:99CR191-1
Plaintiff,	)	
vs.	)	Greensboro, North Carolina
WILLIAM JOSEPH HARRIS,	)	October 26, 1999 10:05 a.m.
Defendant.	)	(Pages 1-161)

TRANSCRIPT OF CHANGE OF PLEA HEARING
and BENCH TRIAL

BEFORE THE HONORABLE WILLIAM L. OSTEEN, SR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

STEVEN H. LEVIN, ESQUIRE
Assistant United States Attorney
Post Office Box 1858
Greesnboro, North Carolina 27402

For the Defendant
William J. Harris:

WILLIAM C. INGRAM, ESQUIRE
Assistant United States
Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401

Court Reporter:

Mary Jo Beck, CSR, RPR, RMR
Room 101, U.S. Courthouse Building
324 West Market Street
Greensboro, North Carolina 27401

Proceedings reported by stenotype reporter.
Transcript produced by computer-aided transcription.

* * *

[2] INDEX

WITNESS	DX	CX	RDX	RCX	COURT
WILLIAM JOSEPH HARRIS	(Change of plea hearing)				6
JOSEPH ALEXANDER BOYKIN	33	53			
ROBERT EURY	60	63			
WILLIAM JOSEPH HARRIS	67	86	102 107		103 109
TODD ALRIDGE CRUMP	110				
ROGER HER	113				
LEE JAMES McRAE	115	120			121
PATRICK MASSARONI	123	129			129

EXHIBITS

NO.	PAGE
Government's 1-3	37
Government's 2-A	42
Government's 4	42
Government's 5-6	48
Government's 7	45
Government's 8	87
Defendant's 1	76

[3] (Court in session at 10:05 a.m.)

(Defendant present.)

THE COURT: Well, Mr. Ingram may be off the hook a little bit here. I seem to have left the file in Greensboro this morning. And I took it to Greensboro, so I know it was my fault. Nevertheless, we can proceed.

But there is no plea agreement on this, I take it, is that right?

MR. LEVIN: That's correct, Your Honor.

THE COURT: If you will let me have a copy of the indictment.

MR. LEVIN: Your Honor, I don't believe I have called the case yet.

THE COURT: You haven't yet. Give it to Mr. Howard.

All right, Mr. Levin, what are you calling this morning?

MR. LEVIN: Government calls *United States of America versus William Joseph Harris,* Case Number 1:99CR191-1.

This matter is on for a change of plea initially, followed by a trial, Your Honor.

THE COURT: All right.

Mr. Ingram, are you and your client ready to proceed?

MR. INGRAM: Yes, Your Honor, we are.

THE COURT: Mr. Ingram, you have a matter that you wish to take up before we get to the trial, that is, a change of plea on what I take is to Count 1?

[4] MR. INGRAM: That's correct, Judge. My client will enter a guilty plea this morning to Count 1, and we will proceed to trial on Count 2. And it is my understanding at some point prior to trial Mr. Levin will, in open court, move to dismiss Counts 3 and 4.

THE COURT: Mr. Ingram, have you had all of the time that you need to have with your client before coming here this morning on Count 1?

MR. INGRAM: Yes, sir, Your Honor, we have.

THE COURT: Do you believe he understands what he is charged with in Count 1?

MR. INGRAM: Yes, I do.

THE COURT: After you had done the work that you thought was necessary to do in connection with that case, did you give your client your advice as to what you thought he ought to do on Count 1?

MR. INGRAM: Yes, I did.

THE COURT: And did he seem to understand and want to accept that advice?

MR. INGRAM: Yes, he did.

THE COURT: And was the advice that he plead guilty to Count 1?

MR. INGRAM: That was my advice, yes.

THE COURT: And it is your understanding that in return for that plea of guilty to Count 1, and upon the

disposition of [5] Count 2, that the Government will not object to a dismissal of Count 3; is that correct?

MR. INGRAM: Counts 3 and 4.

THE COURT: Counts 3 and 4?

MR. INGRAM: Yes.

THE COURT: Mr. Ingram, you obviously, then, think that's in your client's best interest, is that correct?

MR. INGRAM: That's correct.

THE COURT: So far as you know, has anybody made any threats or promises to get your client to tender a plea of guilty to Count 1?

MR. INGRAM: No, Your Honor.

THE COURT: Then let me talk to Mr. Harris.

Yes, sir?

MR. LEVIN: I'm sorry to interrupt, Your Honor, but I want to make clear that the Government's motion to dismiss Counts 3 and 4 is not related in any way to the plea of guilty to Count 1. It's a separate matter entirely, and I just want to make sure.

THE COURT: Whatever is being done in Count 1 has no effect on the dismissal of Counts 3 and 4?

MR. LEVIN: Right. We intend to dismiss Counts 3 and 4, regardless of the plea entered into in Count 1.

THE COURT: All right. Do you understand, Mr. Ingram, that though it may be done at the same time that

sentencing [6] takes place, that it is not necessary that he enter a plea of guilty to Count 1 in order to have Counts 3 and 4 dismissed?

MR. INGRAM: That is my understanding. And, in fact, Your Honor, there really is no bargain here. He is not receiving anything in exchange for pleading guilty to Count 1.

THE COURT: All right, sir. Then let me talk to Mr. Harris a little while.

Mr. Harris, if you will put your left hand on the Bible and raise your right hand, please, sir.

WILLIAM JOSEPH HARRIS, DEFENDANT HEREIN, SWORN DIRECT EXAMINATION

BY THE COURT:

Q Mr. Harris, I'm sure you understand, but I must ask you anyway, do you understand that you have just taken an oath to respond truthfully to all questions put to you by the Court?

A Yes, sir.

Q Do you further understand that failure to respond truthfully could cause the Court to reject what you're wanting to do in Count 1 here today, but in addition to that, it could result in independent charges of perjury being brought against you if you intentionally tell the Court something that is not true? Do you understand that?

A Yes, sir.

Q Have you ever been hospitalized for any mental condition or drug addiction?

[7] A No, sir.

Q Are you presently under the care of a doctor?

A No, sir.

Q Are you taking any kind of prescribed medicine?

A No.

Q You are not in custody?

THE COURT: Is that correct, Mr. Ingram?

MR. INGRAM: That's correct, Judge.

BY THE COURT:

Q This will not be used to penalize you in any way, so you may answer freely, but have you within the last 24 hours consumed any kind of alcoholic beverage?

A Yeah.

Q All right. When?

A Last night.

Q And how much at that time did you consume?

A A couple Rolling Rocks.

Q A couple Rolling Rock beer, is that right?

A Yes.

Q About what time?

A. About 10:00.

Q Was there anything about the consumption of the beer that you drank about ten o'clock that in any way prevents you from hearing and understanding what the Court is saying to you today?

A No, sir.

[8] Q Have you had any kind of illegal substance in the last 24 hours?

A No, sir.

Q Mr. Harris, have you had all of the time that you wanted to have with Mr. Ingram before coming here today?

A Yes, sir.

Q Do you believe that Mr. Ingram has followed up on everything that you wanted him to follow up on before coming here?

A Yes, sir.

Q And so far as you know, has Mr. Ingram done anything that you did not want him to do before coming here?

A Not yet.

Q Pardon?

A No.

Q Now, do you understand that if you tender a plea of guilty to Count 1, you are pleading guilty to a felony, and as such you would be losing your civil rights? Of course, you lose your civil rights if you're found guilty by a jury, also.

So, the fact that you plead instead of being found guilty is not determined here. But if you plead guilty or are found guilty, you lose your civil rights, among those rights being the right to vote, the right to hold public office, the right to serve on a jury, and the right to own or to even possess a firearm. Do you understand that you would be giving up those rights?

[9] A Yes, sir.

Q Did anybody make any threats or promises to you to get you to plead guilty to Count 1?

A No, sir.

Q Let me more specifically ask you, has the Government promised you anything in order to get you to tender your plea of guilty to Count 1?

A No.

Q All right, sir.

THE COURT: Now, since I sent Mr. Howard out with the indictment, what does Count 1 charge? Is it a drug case?

MR. LEVIN: Yes, Your Honor. Specifically, that on or about April 30th, the defendant willfully, knowingly and intentionally and unlawfully distributed approximately 114 grams of marijuana, Your Honor.

THE COURT: All right.

BY THE COURT:

Q Now, Mr. Harris, if you want to have a jury trial in this case you're entitled to do that. Nobody can take that away from you. Do you understand that?

A Yes, sir.

Q And if you want a jury trial, then it would be up to the Government to prove its case beyond a reasonable doubt. And if it cannot prove its case beyond a reasonable doubt, then you would be entitled to be found not guilty. Do you understand [10] that?

A Yes, sir.

Q What the Government would have to prove beyond a reasonable doubt is that sometime on or about April the 30th, 1999, in the Middle District of North Carolina, that you knowingly and willfully and intentionally possessed for the purposes of distribution an amount, not necessarily an exact amount, but an amount of marijuana, and that at the time that you possessed it for the purposes of distribution, or at the time that you attempted to distribute it, that you knew that you possessed some kind of controlled substance.

A Yes, sir.

Q Do you understand that's what the Government would have to prove?

A Yes, sir.

Q Now, do you understand that if you want to have a jury trial that you're entitled to confront all of the witness that the Government may bring in here against you, and to have Mr. Ingram cross examine those witnesses to bring out favorable testimony to your side of the case and unfavorable testimony to the Government's side of the case? Do you understand that?

A Yes, sir, I do.

Q You are also entitled, if you're able, you're entitled to subpoena witnesses who may be helpful to you; and if you are not able to pay for the attendance of those witnesses, then you're [11] entitled to ask the Court to order that those witnesses be here, and the Court would then require that the Government pay for their attendance. Do you understand that?

A Yes, sir.

Q Do you also understand that you would have a right to testify in your own behalf, and if you wanted to exercise that right nobody could keep you off the stand? Do you understand?

A Yes, sir.

Q But you also have a right not to testify. And if you don't want to testify, then nobody could make you go on the stand to testify, and the fact that you don't testify could not be used to prove your guilt. Do you understand that?

A Yes, sir.

Q Now, Mr. Harris, if in fact the Court accepts your plea of guilty here as you're tendering, there is not going to be any jury in this case for anything, and the only thing left for the Court to do will be to determine an appropriate sentence. Do you understand that?

A Yes, I do, Your Honor.

Q Do you understand that the maximum sentence which the Court could impose upon you is no more than five years imprisonment, followed by not less than two years of supervised release, and in addition to that a fine

of no more than $250,000, restitution and forfeiture could be appropriate, and that there would be a special assessment of $100. Do you understand that's the most [12] that the Court could do?

A Yes, sir.

Q Now, has Mr. Ingram talked to you about something called Sentencing Guidelines?

A Yes, he has.

Q It may be that Mr. Ingram, because he is experienced in this field, he may have, after he did his work – I would assume he would still have to pull out a book, I certainly would – and say here is where I think you fit within Sentencing Guidelines, and here is where I think you'll be sentenced on this count with the minimum and maximum range. He may have told you that. And if he did, that's perfectly all right. Did he do that?

A Yes, he did.

Q That's fine for him to do it, but you should know right now that even Mr. Ingram may not know all of the factors that are necessary to be considered in sentencing, and no one will know all of those factors until after a presentence report is done. Only then will your ordinary Sentencing Guideline be determined. Do you understand that?

A Yes, sir.

Q Once your ordinary guideline range is determined, then for good and valid reason the Court can remove you from that guideline and put you in a more

severe sentencing category or a less severe sentencing category, if appropriate. Do you understand that?

[13] A Yes, sir.

Q Do you understand that if you get more time than you thought you were going to get, that that's no reason to let you withdraw your plea of guilty, you would be stuck with it at that time? Do you understand?

A Yes, sir.

Q Now, if you think that the Court improperly gives you too much time in this case you have a right to appeal. But if the United States Attorney's office believes that this Court has improperly given you too little time, then Mr. Levin and his office have a right to appeal to ask the Fourth Circuit to make me properly resentence you. Do you understand that?

A Yes, sir.

Q Has anybody made any threat or promise to get you to do anything that you're doing here today?

A No, sir.

Q Is there any question about what you are doing that you want to ask the Court about?

A No, sir.

Q Do you still wish me to accept your plea of guilty to Count 1?

A Yes, sir.

Q How far did you go in school, Mr. Harris?

A Eleventh grade.

Q As such, I would guess, but it is purely a guess, that you [14] probably gained enough experience to be able to read and understand the indictment for yourself, is that correct?

A Yes, sir.

Q And did Mr. Ingram go over it additionally with you to the extent that you felt comfortable that you understood exactly what you were charged with?

A Yes, he did.

Q Is there still anything you want to ask the Court about what you're doing?

A No, sir.

THE COURT: Mr. Ingram, do you have any other inquiry you wish the Court to make?

MR. INGRAM: No, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: Your Honor, my only concern, I believe the Court indicated that the Government would have to prove possession with intent to distribute. Count 1 is actually a straight distribution.

THE COURT: It's what?

MR. LEVIN: It is a distribution charge, Your Honor. And I think the Court indicated possession with intent to distribute when discussing.

THE COURT: Okay.

MR. LEVIN: I don't think it makes any difference, but I want to point it out to the Court.

[15] BY THE COURT:

Q This is a distribution, and that would require not necessarily that you possess it, but it would require that you are part of the agreement and part of the act of distribution of the marijuana. Do you understand that?

A Yes, sir.

Q One other thing I did not say: When I gave you the maximum sentence that the Court could impose, which was five years, followed by not less than two years of supervised release, you should know also, Mr. Harris, that whatever time you may get by way of active sentence, there will be supervised release for some period of time following that. And though you may serve every day, you do understand that parole has been abolished in the federal system?

A Yes, I do.

Q And what time you get is pretty much what you serve. And whatever sentence you may get, once you serve that sentence and are on supervised release, then, and in that event, if you violate the terms of supervised release you could be subject to an additional active prison sentence for the violation of the supervised release. Do you understand that?

A Yes, sir.

Q All right, sir.

THE COURT: Anything else now, Mr. Ingram, that you have?

MR. INGRAM: No, Your Honor.

[16] THE COURT: Mr. Levin?

MR. LEVIN: No, Your Honor.

THE COURT: The Court will find, then, that Mr. Harris has willfully, knowingly and intentionally tendered his plea of guilty to the charges contained in Count 1 of the indictment, only after a full understanding of all of his rights pertaining to the defense of this matter, and that no threats or promises have been made to him in order to induce his plea. Therefore, the Court accepts the plea tentatively, only subject to a basis in fact being shown for the acceptance of the plea, which may be done during the trial of the next matter.

Is that what we're going to do?

MR. LEVIN: That's what we expect to do.

THE COURT: Is that all right with you, Mr. Ingram?

MR. INGRAM: Yes, sir.

THE COURT: All right, sir. If this is your only copy, you may have it back.

MR. LEVIN: I have an additional copy.

THE COURT: We'll proceed at this point with the trial on Count 2.

MR. LEVIN: Your Honor, at this time the Government would move to dismiss, without prejudice, Counts 3 and 4.

THE COURT: All right. Without objection on the part of Mr. Ingram and his client, Counts 3 and 4 will be dismissed.

Mr. Ingram, you have a motion to make before. Is that [17] more appropriately done now or is it after opening statements, when I get a little better feel of what we are proceeding with here?

By the way, do you have the waiver of jury trial?

MR. INGRAM: I do not have that.

THE COURT: I guess that's in the file.

MR. INGRAM: We have not signed it.

THE COURT: You have not signed?

MR. INGRAM: We only made a decision, Mr. Levin and I, then my client and I, I believe, on about midday on Thursday to do that, and we have not yet signed a waiver of jury trial.

THE COURT: Do we have those forms or does the United States Attorney's office have those forms?

THE CLERK: I have never seen one, I don't think.

THE COURT: You don't have those anymore? We used to have one.

MR. LEVIN: I didn't know our office would have it. I assumed it would be filed by the defense.

THE COURT: Let me talk to Mr. Ingram for a moment.

Mr. Ingram, after you had done all of the work that you thought was necessary for you to do, did you give your client your advice as to what to do on Count 2?

MR. INGRAM: Yes, I did, Your Honor.

THE COURT: And as I understand it now, your client wishes to continue his plea of not guilty, but he also wishes to [18] waive a jury trial in the matter, is that correct?

MR. INGRAM: That is correct.

THE COURT: Do you believe that is in your client's best interest?

MR. INGRAM: Yes, I do.

THE COURT: Let me speak to Mr. Harris.

BY THE COURT:

Q Mr. Harris, you need not be sworn again, because you're still under oath from the last time.

Mr. Harris, Mr. Ingram did give you his advice on what to do here, is that correct?

A Yes, sir.

Q And did you understand the advice that Mr. Ingram was giving to you?

A Yes, I did.

Q Did you want to accept that advice?

A Yes, I did.

Q Do you understand, in making the decision on Count 2 that you're making, that you are waiving a jury

trial of 12 people, and allowing the Court to simply be in the position of a juror in this case, to make a decision of guilty or not guilty? Do you understand that?

A Yes, sir.

Q And no one can force you to do that. If you want a jury trial in this matter, you will not be penalized for that, and [19] that's a decision that is completely voluntary, must be voluntary on your part. Do you understand that?

A Yes, I do, sir.

Q Do you also understand that if a jury gets this case, they're not entitled to make a consensus or a majority decision on guilty or not guilty, they're required to make a unanimous decision of guilt before you could be found guilty? Do you understand that?

A Yes, sir.

Q Do you understand that by doing it this way, you're leaving it in the hands of one person to make that decision?

A Yes, I do.

Q That's what you want to do?

A Yes, sir.

Q All right, sir. All right. You may have a seat, Mr. Harris.

MR. INGRAM: Your Honor, I have a copy of my motions that were filed. Since you don't have a file, if you would like me to hand that up.

THE COURT: I would.

MR. INGRAM: Your Honor, I have handed up a copy of Mr. Levin's Notice of Intent concerning some 404(b) information, and my motions in liminie [sic], and my response to that Notice of Intent.

THE COURT: Why don't you let me look at these just a moment.

[20] All right. I will again take this up at the time that there is an attempt to introduce any evidence here, Mr. Ingram, but it appears to me that on number one, motion to exclude evidence of frequency of defendant's marijuana transactions, and the quantity of marijuana involved in those transactions, I'm not sure whether there is a difference in amounts. But from your position, as I understand it, you intend to introduce evidence that he did, in fact, sell marijuana on other occasions at home, and didn't have a gun at home.

And it seems to me that that would be appropriate for the Government to show that he did have the gun on other occasions when he did sell marijuana. That seems to me to be somewhat a factual dispute, although it may be your position that as long as he was at home, he did not have a gun, therefore, that should shed some light on the fact that the gun at the pawn shop was not for the purposes of carrying during and in relation to the marijuana transaction. It seems to me like both sides of those might be relevant.

Secondly, the recorded conversations between Agent Boykin and the defendant, I'm not quite sure that I understand that, but your indication is – and number

two, that there is no reference to anything except a sale of marijuana at that point. And I could sort of understand your position on that, but then it looks to me like in number three you indicate, well, there was a discussion of some guns in there, which is very [21] prejudicial to the matter. I'm not sure I quite understood what drives that distinction.

MR. INGRAM: Your Honor, if I might respond to both of those matters.

THE COURT: Yes.

MR. INGRAM: I really think to the extent that I requested that there being no cross examination about frequency of transactions, I would withdraw that.

I'm more concerned about the quantity, because, first of all, I think it is irrelevant to the issue of whether or not he carried a firearm on any occasion when he sold marijuana, wherever he may have sold it. The key issue there is did he carry a firearm in relation to those sales.

THE COURT: Let me stop you right there. If you do try to show that he made sales of marijuana at home, and did not have a weapon present, do you intend to show the amounts, quantity of those sales?

MR. INGRAM: No, Your Honor.

THE COURT: All right. I would tend to agree then, from what you're saying, that I don't think the quantity of marijuana is necessary to bring out, but let me ask Mr. Levin.

Is that something that is relevant, Mr. Levin?

MR. LEVIN: I think it is relevant, Your Honor, to show that if it was a small stash of drugs, perhaps the defendant didn't feel it was necessary to protect the drugs with a weapon. [22] If it turns out it was an enormous amount of drugs, perhaps it may be relevant for other purposes.

THE COURT: What I am hearing, the sale took place at the pawn shop, the sales. Then Mr. Ingram is saying there were sales at home where he didn't have a weapon.

What relevancy is there to the amount? I guess possibly that can be relevant. However, I am going, Mr. Levin, to exclude the amounts and the sales that you intend to introduce unless the defendant comes on the stand and says these were smaller amounts at home. Then I would let you put your evidence on at that point.

MR. INGRAM: Your Honor, while I'm thinking about it, I don't know that any of that testimony would be relevant. The fact is, this is a charged count, which takes, on April 30th, sales actually behind the pawn shop. I don't know whether it's relevant that on some other occasions he didn't carry the weapon.

THE COURT: Then if it's not, and the Court says that's not relevant, then it's not relevant as to the amounts at the pawn shop.

MR. LEVIN: Certainly.

THE COURT: What I would rather do is exclude it at first, and then come back to it if it becomes necessary.

MR. LEVIN: That's fine, Your Honor.

THE COURT: All right.

[23] MR. INGRAM: Let me make sure that the Court is – knows what my position exactly is. I'm not objecting to evidence, for example, from the undercover agent that he bought marijuana at the shop on other occasions.

THE COURT: I understand.

MR. INGRAM: What those quantities were. And to respond to Your Honor's – one of Your Honor's points there, if – I anticipate that if my client testifies, and testifies about sales at his home, he would testify that – without testifying about specific amounts, he would testify that he, in fact, sold larger amounts at home than he did to the agent at the shop.

THE COURT: But then I think that's not the – may not be the entire line of questioning that would be relevant. It may be that he sold larger amounts at home than he did at the shop. But it's the amount that is available for sale that may be relevant, too.

He may have sold all that he had at home, and for instance sold five grams at a time, and sold only two grams at the shop, but he had a pound available at the shop. That might make a difference.

I don't know whether it will or not. I just don't want to rule on it until I hear what is said, because I think it does bear on the things that you're talking about, and I would rather reserve that right until the time comes.

MR. INGRAM: All right.

[24] Your Honor, on the second motion about the tapes, the objection was, it is my understanding there is only one tape of one recorded conversation, that is from

April the 29th, a recorded conversation there in the pawn shop, at which time one of the marijuana transactions took place.

And it's about, my guess, anywhere from 35 minutes to a 45-minute conversation. It's on two sides of a regular cassette tape. I did not hear that, through no fault of Mr. Levin. I did not get a copy of that tape to listen to prior to filing my motion.

I had seen Agent Boykin's report about that transaction, and in that report he indicated there was some statement by my client that – to the effect that they were talking about the gun in question; that my client admittedly was wearing on his hip at the time the transaction took place. And they started talking about the type of ammunition that was in it.

And by way of illustration, to tell the agent, or as far as he knew, tell the customer the power of that, he made some statement to the effect that the ammunition was powerful enough to penetrate the body on or kill a cop.

That, I contend, is inadmissible for three reasons: First of all, I have now listened to that type, [sic] and to me it is largely unintelligible, and I think so unintelligible that it becomes unreliable and, therefore, the Court should exclude it on that basis alone. I understand Your Honor would have to [25] listen to that before you could make that determination.

Secondly, I contend that it is irrelevant. Any discussion about the ammunition that was in the gun is irrelevant to the issue of whether or not the gun was being carried at that time in relation to the drug transaction. I

don't think even Mr. Levin would contend that the discussion about the gun and ammunition was about – was in the context of talking about a drug transaction, and what if the cop showed up, then this gun could kill a cop, if they showed up at a drug transaction.

This was in the context of a discussion about weapons in general, and this particular firearm that my client had on him at the time. They were talking about the power of the ammunition and type of weapon and compared it to other types of guns.

So, I contend it is irrelevant. I would be more concerned if we had a jury here, but I'm still contending that technically, therefore, aside from being irrelevant, if there is any minimal relevance, that relevance is outweighed by the prejudice, substantial prejudice to my client under Rule 403.

My understanding, finally, is that Mr. Levin intends to only play the 10 or 15 seconds out of that 30, 40-minute conversation, and I think that would make that 10, 15-minute second conversation portion become even more unreliable, unless Your Honor can hear the entire thing in its context to [26] understand this is not some discussion about drugs, sale of drugs, and if the cops show up, these bullets can kill a cop.

This was, I think, Your Honor would need to hear all of that to understand this was simply a discussion about in the context of being in a pawn shop where weapons are for sale, legally; that they were talking about ammunition in a gun that was legal, and this was simply an illustration that my client was giving.

So, basically, I say that it is too unintelligible to be reliable, and should be excluded; and secondly, it is irrelevant, and Your Honor would need to listen to it to determine its relevance; thirdly, if it has minimal relevance, the prejudice far outweighs any relevance.

THE COURT: I have a hard time with that one, Mr. Ingram. Certainly, the unintelligible part of it, as you say, I would have to hear that. If a person is charged, for instance, with conspiracy to kill game, deer, out of season, the fact that an individual who is accused of doing that did, in fact, sell a weapon to the hunter, and says here is a gun that will penetrate the body and expand, and you don't have to hit a deer in the heart for this shell to kill him, it seems to me would be relevant on the question of whether that individual who sold that gun may have been doing it for the purpose of a conspiracy to kill the deer. Maybe.

Now, that may be an off-the-wall example, but if an [27] individual is intent on buying contraband or illegal drugs, and the dealer puts a gun on the table and says that gun will take care of any police officers, that seems to me to be somewhat indicative of why the gun is there. And it may be that that was said for the purpose of just showing how powerful the gun is, but it may be argued on the other hand that it was more of a purpose of showing if police officers show up, that's what it is for.

Maybe a little clearer example would be if any DEA agents show up, that would penetrate their breast plate, even if they are wearing it, something of that nature. I'm not sure that I can find that that is completely irrelevant to this matter. And the prejudice, I think the Court is in a

position to handle a difficulty that a jury may not be able to handle on 403. However, to beg the question a little further, I would rather hear the case a little bit before I rule on any of those. I understand what your objections are.

MR. INGRAM: And, Your Honor, I certainly – if Your Honor is going to listen to it, I would urge the Court to listen to the entire tape, because – and so Your Honor understands the context, this was a discussion there in the pawn shop, not back in the back room or out back somewhere. This was a discussion with other people present, an ongoing discussion about other things. This was not in the context of any discussion about drugs.

[28] THE COURT: It was not?

MR. INGRAM: The drug discussion came later, or perhaps a little bit of it earlier, but then they go on and talk about lots of other things for an hour, or 30, 40 minutes anyway.

THE COURT: I think I would have to listen to the whole thing. Certainly, upon your request, I would listen to the whole thing. And if it did not occur, if it occurred at a time other than in connection with the drug trafficking, that is, your point is well taken.

However, if it's the third time that this person has showed up to buy marijuana, and the comment is made, it takes on a little more significance.

MR. INGRAM: Your Honor, this was actually the first time.

THE COURT: The first time. Okay. See, I don't know all of those peculiar facts to this case, and I simply can't rule on that, and we will take that as we come to it.

Do you wish to be heard any further, Mr. Levin?

MR. LEVIN: No, Your Honor. I think once the evidence is heard, the Court will understand.

THE COURT: All right. I certainly understand the motion, and I will welcome any objection that you might want to interpose at that time.

Mr. Levin, you have an opening statement that you wish to make?

[29] MR. LEVIN: I do, Your Honor.

THE COURT: You may do so.

MR. LEVIN: May it please the Court, Mr. Ingram, Your Honor.

The Government has the burden to prove beyond a reasonable doubt that the defendant carried a firearm during and in relation to a drug trafficking offense. We welcome that burden, Your Honor.

On April 29, 1999, Special Agent Joseph Boykin entered the Harris Pawn Shop. As you might guess, the Harris Pawn Shop is a pawn shop owned by the defendant. And in many ways it's like a typical pawn shop: It offers old TVs, sporting equipment, tools, even weapons hanging on the wall, all for sale.

In other ways it's not so typical, Your Honor, for the Harris Pawn Shop, in addition to offering legal merchandise, offered for sale marijuana.

So, on April 29, Special Agent Boykin walks into that pawn shop. He does not go in alone; he is with the defendant's half brother. And the defendant's half brother makes an introduction between the agent and the defendant.

And after some conversation, the defendant agrees to sell marijuana to the agent, and Agent Boykin buys the marijuana. As I indicated, Special Agent Boykin was not alone, nor was the defendant, for with the defendant, by his side, in his holster, [30] was sitting a nine millimeter semi-automatic pistol. And it was loaded. We know it's loaded because of the conversation that ensued between the agent and the defendant.

After the discussion about the weapon, they agreed to meet the following day for another distribution. So, on April 30th, which is the date that is reflected in Count 2 of the indictment, Agent Boykin goes to the pawn shop, and Defendant Harris is there.

This time, however, Defendant Harris directs Agent Boykin outside in a car parked behind the pawn shop. And while the two are in the vehicle, while the defendant is carrying his firearm in his holster by his side, the Defendant Harris sells 114 grams of marijuana to Agent Boykin. And Agent Boykin gives the defendant $360. And they leave.

And again on May 6, another sale takes place, and again the defendant is carrying a pistol in his holster by his side.

Your Honor, that's what we anticipate the evidence is going to show. And once the Court sees the evidence, we feel you will render a fair and just verdict.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Levin.

Mr. Ingram, do you wish to make an opening statement or reserve it?

MR. INGRAM: Yes, Your Honor.

THE COURT: You may.

[31] MR. INGRAM: Your Honor, we do not agree – we do not disagree with the evidence that is summarized by Mr. Levin, and likely will not disagree with the evidence that the Government will put on in its case in chief. That is, we agree and admit that Mr. Harris owned a pawn shop; that Agent Boykin came in on four occasions to purchase marijuana, and on the three occasions that Mr. Levin mentioned, April 29, April 30th and May 6, that Mr. Harris sold a relatively small quantity of marijuana to Agent Boykin, and each of those times he was carrying a nine-millimeter firearm by wearing it in a holster on his belt.

So, as to the elements of the offense, we agree that he carried – he carried a firearm, that he carried it during a drugs [sic] transaction, but we deny that the firearm was carried in relation to the drug transaction.

Our position is that the Government's evidence will simply show and prove beyond a reasonable doubt that he carried that firearm during the drug transaction, and we will contend in – our evidence we contend will show

that the firearm he carried was carried solely in relation to his pawn shop business.

In addition to the Government's evidence, we anticipate putting on evidence that the – that Mr. Harris has a federal firearms license to sell, or actually his father has a federal firearms license to sell, that the pawn shop used so they could legitimately sell firearms out of that location, and that, in [32] fact, they do buy and sell in the pawn shop firearms, televisions, other appliances, tools, jewelry, coins and so forth.

The evidence will also show that he deals only in cash. People who come in to pawn something only want cash, and he only deals in cash, and that he does not accept checks when somebody comes in and buys something, so that he deals only in cash. And at all times, not only has jewelry, firearms, other valuable items there, but that he has anywhere from 2 to $4,000 in cash in his cash drawer at any one time on any particular day.

Our evidence will show that he – his practice was that from the time he opened his pawn shop in the first location, and after he moved it to the second location where Agent Boykin found him, that he wore a firearm every day, all day, every hour of every business day, for the purpose of protection of the pawn shop.

There will be evidence that when he locks up at night, that he locks up the firearm in a drawer there in the shop, and never carries the firearm home.

There will be evidence that he has sold marijuana on other occasions at his home, and that he did not have a

firearm either on his person or anywhere in his house at the time he sold marijuana out of his home.

Finally, we will show that if it is not a standard in the industry, it is certainly a common practice in the pawn shop [33] business for weapons to be carried by the owner or manager or the person in charge, by showing that it is a practice in a number of other pawn shops.

Generally then, we contend that the evidence will show conclusively that Mr. Harris wore the firearm solely for protection in his business, as do virtually all other pawn shop owners, and it was simply a coincidence that he had on the firearm at the time of – the marijuana transactions took place, and, therefore, he was not carrying that firearm in relation to the drug transactions.

THE COURT: All right. Thank you, sir.

You may proceed, Mr. Levin.

MR. LEVIN: Thank you, Your Honor. The Government calls Joe Boykin.

JOSEPH ALEXANDER BOYKIN, GOVERNMENT'S WITNESS, SWORN DIRECT EXAMINATION

BY MR. LEVIN:

Q If you would please tell the Court your full name.

A Joseph Alexander Boykin.

Q How are you employed?

A I am a special agent with the United States Department of Treasury, Bureau of Tobacco, Alcohol and Firearms.

Q How long have you been so employed?

A I have been employed with ATF for seven years.

Q What are some of your responsibilities, Agent Boykin?

[34] A We investigate violations of the federal law involving explosives, arson, alcohol, tobacco, and firearms violations, including how they relate to narcotics trafficking.

Q How many investigations in the last seven years surrounding drug trafficking violations have you participated in?

A In the last seven years, probably around 100.

Q What kind of training have you received?

A I graduated from the University of South Carolina Criminal Justice Academy. Attended the South Carolina Criminal Justice Academy. I was a law enforcement officer in South Carolina for four years before becoming an ATF officer. Also attended the Federal Law Enforcement Training Center in Glynco, Georgia, criminal investigator school, and also graduated from the ATF national academy, also in Georgia.

Q Have you testified in court before?

A Yes, sir.

MR. LEVIN: Your Honor, at this time we would tender Special Agent Boykin as an expert in the field of investigating violations of drug trafficking laws.

MR. INGRAM: I will object to that.

THE COURT: In what area do you want him to testify as an expert?

MR. LEVIN: Specifically the tools of the trade that accompany drug trafficking crimes.

THE COURT: Mr. Levin, you have come into the U.S. [35] Attorney's office since this was done in this court, and I do not hold you responsible for it, but about four years ago I indicated to the U.S. Attorney's office that if they wished to qualify an agent as an expert, they could certainly do that. There were circumstances that they could, but that I would not want that expert to testify as to factual matters also before a jury, because he had a unique qualification which gave his factual testimony perhaps more relevancy than it would otherwise be entitled to.

Now, this is a judge trial and not a jury trial, but I am not sure that as a matter of expertise it needs to be shown. It seems to me that there is another area upon which this could be done, if it's relevant, and that is simply from his practice and experience in the field, without qualifying as an expert.

I have no problems in qualifying him, because this is a judge trial, and we are not involved with the same problem I would be involved with if it were a jury trial. But I mention that at this time only to let you know that that word probably has not filtered over to you; that if this were a jury trial, I would sustain the objection immediately and say either use him as a factual witness or an expert, but you can't do both of them.

MR. LEVIN: Okay.

THE COURT: In this case, Mr. Ingram's objection, let me see if he has any other objection that I am not considering [36] here.

MR. INGRAM: No, Your Honor.

THE COURT: All right. In that event, I am going to allow you to consider him as an expert in the field of investigations, but I am not sure what additional weight I will give to that. I will let both parties know at the time so that you will know what to do.

MR. LEVIN: Thank you, Your Honor.

THE COURT: All right.

BY MR. LEVIN:

Q Special Agent Boykin, did you have an opportunity to investigate the defendant for selling drugs on April 29?

A Yes, sir, I did.

Q Can you tell the Court what happened on that day?

A Well, on April 29, I accompanied a confidential informant, who is a half brother of Mr. Harris, a Rodney Deaton, to Harris Pawn Shop for the purpose of attempting to purchase a quantity of marijuana from Mr. Harris.

Mr. Deaton made the introduction of myself to Mr. Harris at the pawn shop. On this occasion I observed Mr. Harris walking around the pawn shop with a pistol on his waist in a holster, in a cross-draw fashion. It was on his

left side, or – and it was – he was right-handed, where he could reach across and draw the weapon if he needed to.

Q Had you ever met Defendant Harris before?

[37] A No, sir, I hadn't.

Q Do you see him in court today?

A Yes, sir, I do.

Q Could you just point to him?

A Yes, sir. He is seated at defense counsel table.

THE COURT: Let the record show that he has identified the defendant, Mr. Harris.

BY MR. LEVIN:

Q Let me show you what has been marked as Defendant's Exhibits 1, 2 and 3, and ask you to take a look at them, please.

A This is Harris Pawn Shop.

Q If I could just ask you about each picture, please.

A Yes, sir.

Q They are photographs, is that right?

A They are.

Q What does Government's Exhibit Number 1 represent?

A It's a photograph of Harris Pawn Shop. It shows if you're walking in the front door. The point of view would be looking to the right side of the pawn shop from the front of the pawn shop. It shows the various shotguns

and rifles that are for sale, and also numerous types of tools, television sets, and other assorted merchandise.

Q If you would, take a look at Government's Exhibit 2 for identification. What does that show?

A It is a picture of the defendant, Mr. Harris, standing in [38] his pawn shop wearing a Nike T-shirt and blue jeans.

Q And Government's Exhibit 3, could you please tell me what that shows?

A It shows an individual that I knew to be – by his nickname Scarecrow. A white male with red hair, relatively tall and thin, who was at the pawn shop on frequent occasions when I went there.

Q Do you see a scale in that picture?

A Yes, sir. I see a triple beam balance scale, which appears to be the same scale that Mr. Harris used to weigh the marijuana when I purchased from him.

Q Did you take these pictures?

A No, sir, I did not take them.

Q Do you know where they came from?

A They – to my understanding, they came from a videotape that was –

MR. INGRAM: Objection.

THE COURT: Do you know that yourself, that it came from the video?

THE WITNESS: I know the existence of the videotape, and the tape came from a search that – I was

on the search when it was seized, but I did not remove these photographs from that videotape myself.

MR. INGRAM: Your Honor, I will withdraw that objection.

THE COURT: It seems to me if he can identify this as [39] being relevant, and actually indicative of what was there, that that would be sufficient. All right.

MR. LEVIN: Thank you, Your Honor.

BY MR. LEVIN:

Q Do you know if a law enforcement officer took that video?

A Yes, sir.

Q Let me rephrase it. Did he actually film the video?

A No, sir.

Q Take a look, if you will, at Government's Exhibit 2 for identification.

A Yes, sir.

Q And that shows the defendant, is that right?

A It does.

Q Okay. Do you see on his person in that picture a pistol?

A No, sir, he is not wearing a pistol.

Q Thank you.

MR. LEVIN: If I could retrieve Government's Exhibits 1, 2 and 3, please.

Your Honor, at this time I would move into evidence what has been marked as Government's Exhibits 1, 2 and 3 for identification.

THE COURT: Do you know from your own knowledge the time that Exhibit 2 was taken?

THE WITNESS: No, sir, I do not know the exact time or date. I can only testify that it was at his new pawn shop on [40] Main Street in Albemarle, and I'm not sure exactly when he moved in there.

THE COURT: Does it mean that it was before or after the time of April the 30th?

THE WITNESS: I couldn't answer you honestly, no, sir. I do know it was before May the 18th.

THE COURT: So, are you saying that Government's Exhibit Number 2 is a picture of the defendant in another pawn shop?

THE WITNESS: No, sir, that's the pawn shop in question.

THE COURT: But you know it was after the opening of the new pawn shop?

THE WITNESS: I'm sorry, Your Honor. That is the new pawn shop. That is the pawn shop he was occupying when all of these transactions occurred.

THE COURT: So, it is the one he was occupying on April the 29th and 30th?

THE WITNESS: Yes, sir.

MR. INGRAM: Your Honor, I object to the introduction of Exhibit Number 2, since we don't know the time or date that that photo was taken.

THE COURT: Do you know that the pawn shop was open for business at the time this photo was taken? Do you know whether that was true or not, Mr. Boykin?

THE WITNESS: It appears to be, Your Honor, but I could not testify for a fact that it was before business hours or [41] after business hours.

THE COURT: I'm not sure the significance I put in that. I'm going to admit what is marked as 1 and 2-A, and I'm going to reserve 2 for a little bit longer.

MR. LEVIN: That's fine, Your Honor. Thank you.

BY MR. LEVIN:

Q Special Agent Boykin, have you reviewed the videotape?

A No, sir.

Q Once you arrived at the pawn shop and you talked to the defendant, how did the conversation proceed?

A It was a rather lengthy meeting, the initial time. The informant spoke to Mr. Harris to some extent. I didn't say a whole lot initially at first. As a matter of fact, most of my attention – I was talking to Mr. McRae, who is in the courtroom back there seated in the gallery, who was playing a guitar in the pawn shop.

Mr. Harris had some customers coming in and out of the pawn shop that he was interacting with. There were other individuals that came and went from the pawn shop.

Approximately 30 minutes went by before I actually got to the point of negotiating a marijuana transaction. And we arrived at that point in the conversation while Mr. Harris was standing in a rear counter in the back of the pawn shop, and when I indicated what I was there for, and what I would like to purchase, he pulled from underneath that counter a quantity of [42] marijuana and placed it up on the counter.

MR. LEVIN: Your Honor, if I could correct the record, I think I have been calling them Government's Exhibits 1, 2 and 3, the photographs. They were 1, 2 and 2 Alpha.

THE COURT: Two –

MR. LEVIN: 2-A.

THE COURT: I have admitted 1 and 2-A, but I have not admitted 2.

BY MR. LEVIN:

Q Now I would like to show you what has been marked Government's Exhibit 3 for identification, and ask you to take a look at it, please.

A This is the marijuana that I purchased on April the 30th from Mr. Harris.

Q And do you know how much that weighed?

A The weight we have is approximately 112 grams of marijuana.

MR. LEVIN: Your Honor, the defendant and Government have entered into a stipulation concerning the drug weight and results.

Your Honor, at this time the Government would move into evidence Government's Exhibits 3 and 4.

THE COURT: Well, 3 and 4 is the stipulation?

MR. LEVIN: Exhibit 4 is the stipulation, Your Honor.

THE COURT: All right. You may do so. Without objection, 3 and 4 are admitted.

[43] MR. LEVIN: If I could retrieve Government's Exhibit 3, please.

BY MR. LEVIN:

Q Special Agent Boykin, did you indicate to the defendant that you wished to make another purchase at another time?

A On the 29th?

Q Yes.

A Yes, I did.

Q And how did that proceed?

A After we had engaged in the transaction, and I purchased the marijuana I purchased from him on April the 29th, I asked him if I could come the following day and purchase some more marijuana from him, and he indicated that I could.

Q Did you have a conversation about a weapon during the course of the discussion of the sale of marijuana?

A Yes, sir.

Q Could you tell the Court about that?

A As we were concluding the transaction for the marijuana, he had brought the marijuana from the back counter up to the front counter, which is where his firearms were displayed on the wall, and then the pistols were in the counter underneath his cash register.

Right next to that was where he had his triple beam balance scales, which is where he weighed the marijuana that I purchased on the 29th. After I had paid him the money and made the [44] arrangement for the next transaction, the tape will bear this out, I recall –

THE COURT: Sustained as to what the tape will bear out. Go ahead.

THE WITNESS: We had a conversation. The informant commented about the firearm that Mr. Harris was wearing on his hip. I made a remark about it.

At that point in time, Mr. Harris removed the firearm from the holster, and was explaining that it was an outlawed firearm because it had a high-capacity magazine. He pushed the magazine release on the side of the pistol and allowed the magazine to come out of the bottom of the pistol, and showed – held the magazine out and showed us the ammunition that was loaded in the magazine.

He called the ammunition silver talent bullets that he said were homemade; that it was reloaded ammunition that had been fired, and then this special bullet was put back in it when it was reloaded to be shot again.

And he said that I could "F-up" a cop with this; that if he shot him, the bullet would go through his heart, after it went through his armored jacket.

BY MR. LEVIN:

Q Were you wearing a recording device at the time?

A Yes, sir. Actually, I was wearing a transmitter that was being monitored by detective –

[45] MR. INGRAM: I have a standing objection to this conversation.

THE WITNESS: – Detective Robert Eury.

THE COURT: Yes, Mr. Ingram, you have a standing objection to this line of testimony, based upon your motion in limine.

BY MR. LEVIN:

Q Special Agent Boykin, do you recognize Government's Exhibit 7 for identification?

A Yes, sir, I do.

Q What is that?

A This is the tape recording that Robert Eury made of my conversation.

Q Have you had a chance to listen to that tape recording?

A Yes, I have.

Q Does is [sic] it fairly and accurately reflect the conversation that you had with Defendant Harris?

A Yes, it does.

MR. LEVIN: With Your Honor's permission, I would like to play the portion of the tape that the agent just testified about.

THE COURT: And this is part of the 45-minute conversation?

MR. LEVIN: Yes, it is, Your Honor.

THE COURT: All right. Now, if you are sure that you [46] want to do that, I will listen to that at this point. However, if I listen to it, Mr. Ingram has moved that the Court should hear it all, and I will hear it all, if he wants to.

I guess there is going to be a contest on that, but let me first ask Mr. Ingram. You have heard this testimony from Mr. Boykin. Do you intend to contest what was said, and about the time that it was said, Mr. Ingram?

MR. INGRAM: May I have a moment to speak with my client about that?

THE COURT: Yes, sir.

(Mr. Ingram confers with Defendant Harris.)

THE COURT: Mr. Ingram, I want to make sure I am clear on what I have said here, and that is, if your client takes the position that what Mr. Boykin said is not accurate, I will hear the tape here for two purposes: One, as to what was actually said at that time; and if it does

show on there the approximate time in relation to the transaction that occurred.

So, I guess what that means is, if your client contests the credibility or believability, then I would grant Mr. Levin's motion to hear the tape.

So, tell me where you are.

MR. INGRAM: Your Honor, I do contest the facts that have been testified to about that conversation today.

THE COURT: All right.

MR. INGRAM: I will object to the tape being played on [47] the basis that it's virtually unintelligible. I know Your Honor has got to hear it in order to determine that.

THE COURT: Right.

MR. INGRAM: And I will, with Your Honor's permission, will reserve the right to play the entire tape in our case in chief if I feel like it's necessary after cross examination of Agent Boykin.

THE COURT: The second thing that I am concerned about is where in the course of the conversation did this occur. And I'm not sure from listening to that particular item that Mr. Levin has asked me to, that that will appear. But we'll just wait and see if it does.

MR. INGRAM: All right.

THE COURT: So, I'm going to grant Mr. Levin's motion to hear the tape at that point, subject to be reviewed again after we hear the matter.

MR. LEVIN: Thank you, Your Honor.

With the Court's permission, may Special Agent Boykin approach the tape recorder and play that portion of the tape?

THE COURT: He may do so.

(Tape played.)

THE COURT: The Court finds from listening to the tape that it is difficult, but not inaudible as to some parts, and that the tape does, in fact, support what was at least a portion of what Mr. Boykin said was the conversation that took place.

[48] I'm not finding that the tape doesn't support the other part, I'm simply not making a finding because I don't know about the rest of it. However, in order to put that in proper perspective, at this point there is testimony that that occurred after the marijuana was up on the counter and had been weighed. Mr. Ingram, I certainly would give you the right to ask the Court to listen to anything else in the tape to show that that occurred before anything else had happened in the pawn shop, because if it did happen before any information was known as to why Mr. Boykin was there, was simply there as someone who had come into the pawn shop for legitimate purposes, then I think there would be some question about the usefulness of that bit of evidence.

As it stands now, I am considering it on Mr. Boykin's testimony that it occurred after the marijuana was paid for and was up on the counter and had been weighed, and so I will give you the right to reserve the right to contest that.

MR. INGRAM: All right.

MR. LEVIN: Your Honor, Government's Exhibit 5 is a stipulation relating to the firearm that was seized from the defendant.

BY MR. LEVIN:

Q At this time I will ask Agent Boykin to look at Government's Exhibit 6 for identification.

A Yes, sir, I recognize that.

[49] Q What is that?

A This is a Taurus nine-millimeter pistol that was possessed by the defendant on the occasions I dealt with him.

MR. LEVIN: Your Honor, at this time the Government would move to introduce Government's Exhibits 5 and 6 for identification, Government's Exhibits 5 and 6.

THE COURT: Any objection?

MR. INGRAM: No, Your Honor.

THE COURT: Mr. Ingram.

BY MR. LEVIN:

Q And is Government's Exhibit 6 the same weapon that you were looking at on the April 29 purchase?

A Yes, sir.

Q Did you testify earlier that you set up or you arranged to meet Defendant Harris again?

A Yes, sir, I did.

Q And what did you all decide?

A I decided that I would contact him and meet with him the following day to purchase an additional quantity of marijuana on April the 30th.

Q What happened on April 30?

A I went again to Harris Pawn Shop, and met with Mr. Harris at the pawn shop. He again was wearing the firearm, as described before, on his hip, cross-draw fashion on the left side, same firearm that I had seen previously the day before.

[50] At this time it was different, in that Mr. Harris instructed me to follow him out of the rear door of the pawn shop into a rear parking area, which was a sand parking lot area behind or – behind to the right of the pawn shop.

There parked behind the pawn shop was a black Dodge Neon vehicle. Mr. Harris got in on the driver's side and instructed me to get in on the passenger's side. We both got in the vehicle, shut the door, and he cranked the car up. The car at this point was faced away from the front street, back towards the woods or the area behind the pawn shop.

He cranked the car up. We drove around in a circle. He pulled back up so as to face the front of the vehicle out towards the main street highway.

Q From that position, would the defendant have been able to see anybody coming up to the vehicle?

A Yes, sir.

Q Please continue.

A After we – the vehicle had been repositioned, he leaned over in the backseat and grabbed a knapsack, unzipped it, and pulled out four clear plastic bags filled with vegetable material, later identified as marijuana, and tossed them in my lap, if you will, rather than just hand them to me. Kind of threw them in my lap, and some of the marijuana was falling out of the bags on my clothes, and I was trying to gather them up.

I put the marijuana in my pants pocket. At that time I paid [51] him in undercover funds $360 for the marijuana, and he exited the vehicle. I exited the vehicle. He left a duffel bag in the vehicle. And still wearing the firearm, we walked back into the pawn shop, after which I departed out of the front door and got in my vehicle and left.

Q Were you able to see how much additional, if any, marijuana was left in the knapsack?

A There were numerous other clear plastic bags filled with marijuana that were remaining in the bag, other than what I purchased. I couldn't give you an actual weight because I didn't see them all laid out, but there were several ounce bags of marijuana in the duffel bag or knapsack.

Q How much money did you give the Defendant Harris that day?

A $360.

Q And that was for how much marijuana?

A Four ounces.

Q And, Special Agent Boykin, I may have misspoken earlier, but the marijuana you saw earlier, that 114 grams that you bought on April 30th –

A That's correct. I did identify that as being the marijuana that I purchased on April 30th earlier.

Q Did any customers approach Defendant Harris in the car?

A No, sir.

Q Were there any items from the pawn shop that you detected in the car –

[52] A No, sir.

Q – other than the marijuana?

A Just the knapsack.

Q Was everybody else in the pawn shop when you arrived on April 30th working there?

A I don't know if they were working there. I do recall, if I'm not mistaken, that the individual I described as Scarecrow was there. I don't see him in the courtroom. He is a rather tall, white male, red hair, often wore like a black Vietnam-style military-type hat, and would hang around the pawn shop frequently.

I don't know if he was employed there or just a friend of Mr. Harris, but he was there, and I guess he was looking after the pawn shop while Mr. Harris went outside to do the drug deal with me.

Q In your training and experience, what usually accompanies these drug trafficking violations?

A All types of paraphernalia, including firearms, cash, currency, pagers, cell phones, scales, baggies, razor blades, cutting agents, all of those sorts of things, sometimes scanners, and various types of things of that nature.

Q Now, on April 29, you indicated to the Court that you never met the defendant prior to going into his pawn shop?

A That's correct.

Q Did the defendant say anything to indicate to you whether or [53] not he trusted you after meeting you?

A Mr. Harris, throughout our transactions together, remained very skeptical. After the first occasion I never went back with the informant, I always went back by myself.

These occasions he commented about the antenna on the pickup truck I drove, called it a spy wire. Another occasion he asked if I was wearing a wire, wanted me to open up my clothes so he could see if I was wearing a wire.

On another occasion he asked me, he wanted to see my wallet to see if I had a badge in my wallet. But all of the while I was still purchasing from him, but he was never comfortable totally with me.

Q On May 6, did you go back to the pawn shop?

A Yes, sir, I did.

Q And did you make a purchase at that time from the defendant?

A Yes, sir, I did.

Q And was the defendant wearing a pistol at that time?

A Yes, sir, he was.

MR. LEVIN: I have no further questions, Your Honor.

THE COURT: Mr. Ingram, cross examination?

MR. INGRAM: Yes, Your Honor.

CROSS EXAMINATION

BY MR. INGRAM:

Q Agent Boykin, on April the 29th, did I understand you to say that while you were in the pawn shop that a number of customers [54] came and went during that time?

A Yes, sir.

Q How many?

A I didn't pay attention. I saw several folks come in and not buy anything and walk out, and I saw Mr. Harris have some conversations with the customers, but I didn't see if they bought anything. I couldn't give you an estimation.

Q How long were you there that day?

A I would say 45 minutes was a fair estimation; 35 to 40 minutes.

Q Were you talking with Mr. Harris most of that time?

A No, sir. I really didn't talk to Mr. Harris until we got to the end of that time period, when we actually did the drug deal and we left.

He was, like I said – he would speak to us occasionally, and spoke to his half brother some. But my actual conversations with him really didn't begin in earnest until right at the end of the tape. Actually, if you played the second side of that tape, that would probably cover the majority of my interaction with Mr. Harris.

Q What time of day was it that you went to the shop on April the 29th?

A It was in the evening. It's actually on the tape. I think it should be a preamble at the beginning of it. It was –

Q Sometime in the afternoon?

[55] A It was in the afternoon, yes.

Q And so, the shop was open for business at that time?

A Yes, it was.

Q As a matter of fact, it had a big sign on the front that said "open"?

A Yes, sir. Every time I dealt with Mr. Harris the business was open.

Q Now, in the conversation that you testified about concerning the ammunition, and the tape we listened to about that conversation, is it still your contention that the defendant said something about if he shot an officer it would go through the armor and into the officer's heart?

A Yes, sir. He said – I won't repeat the expletives he said, but he said he could blank a cop up, and then went on to elaborate that the bullet, the special ammunition he had would go through the armor, the officer's armored jacket, and penetrate his heart.

Q That conversation took place up in the front of the shop, is that correct?

A Yes, sir. That's where we had to relocate to do the drug transaction.

Q Did you say that that discussion began by Mr. Harris' brother-in-law making some comment about the weapon he was carrying?

A Yes, sir. As we moved to the front of the pawn shop where [56] Mr. Harris weighed the marijuana out, and I paid him very shortly following that, is when Mr. Deaton made a comment about the pistol he was wearing on his hip, and that's what elicited the response from Mr. Harris.

Q What did Mr. Deaton say?

A I have to listen to the tape again. He said something about damn, look at that gun, to some extent, or some remark thereabouts. And I think I made a comment, calling the firearm a-hog leg, which is a slang. And that was then followed by Mr. Harris pulling the pistol out, and our conversation you heard on the tape.

Q Now, you're aware, are you not, that Mr. Harris had a license, a valid license to buy and sell firearms back in April and May of this year, is that correct?

A He did not. His father was the licensee. He was just an employee of the pawn shop, selling under his father's license.

Q Right. I will stand corrected on that.

The pawn shop itself had a valid license for firearms to be bought and sold?

A That is correct.

Q And on April 30th, what time of day did you arrive at the pawn shop?

A It was – I'm not sure of the exact time. Again, that would be in the preamble of the tape, but the transaction occurred around 4:15 in the evening, in the afternoon.

[57] Q Again, the shop was open for business at that time, was it not?

A Yes, sir, it was.

Q How long were you there on that occasion?

A Not as long as the first occasion. I think that tape was somewhat shorter. I would say maybe 15 minutes, something like that.

Q And the male you referred to as Scarecrow was present on that occasion?

A Yes, sir.

Q And was anybody – did anybody else come and go during the time you were there?

A Not that I recall.

Q Is it possible that customers did come in and out during that time?

A They may have, while me and Mr. Harris were out in the vehicle.

Q Now, Mr. Levin asked you a few minutes ago if the exhibit of marijuana was the 114 grams that you testified about buying on April the 30th. Do you remember that question?

A Yes, sir.

Q Your testimony actually was it weighed out to be 112 grams, wasn't it?

A Actually, I need to look at the SBI lab report. That would have the actual laboratory weight. What I have in my report may [58] have been a crude weight when we initially weighed it ourselves.

Q You did observe the inventory in the pawn shop?

A Yes, sir.

Q Items that were for sale?

A Yes, sir, I sure did.

Q There were firearms for sale?

A Yes, sir.

Q Jewelry for sale?

A Yes, sir.

Q TVs and other small appliances for sale?

A Yes, sir.

Q Were these all weekdays that each time you went to the pawn shop?

A Yes, sir.

Q Now, you also testified that there are a number of items that commonly accompany drug transactions?

A Yes, sir.

Q For example, razor blades?

A Yes, sir.

Q Were there any razor blades involved in this transaction?

A No. He had a knife to be used. I bought a quantity of what he told me was opium, and it turned out not to be opium, and he had to cut it with a pocket knife, but he did have baggies and scales and so forth.

Q Are cutting agents involved in every drug investigation that [59] you have been involved in?

A No, sir.

Q Are scanners involved in every drug transaction?

A Not every one, no.

Q Are razor blades involved in every drug transaction?

A No, sir.

Q Are firearms involved in every drug transaction?

A No, sir.

Q Is this the only pawn shop you have ever been in?

A No, sir.

Q All right. So, you're familiar with the types of items that are sold in pawn shops?

A Yes, sir, I am.

Q And the items that were for sale or had been pawned in Mr. Harris' pawn shop were typical of pawn shops, is that correct?

A They were.

MR. INGRAM: Thank you. May I have just a moment, Your Honor?

THE COURT: Yes, sir, you may.

(Mr. Ingram confers with Defendant Harris.)

MR. INGRAM: That's all I have. Thank you, Your Honor.

THE COURT: Mr. Levin, do you have anything further?

MR. LEVIN: Nothing further, Your Honor.

THE COURT: Thank you. You may come down, Mr. Boykin.

THE WITNESS: Thank you, sir.

[60] (Witness excused.)

MR. LEVIN: Your Honor, the Government calls a short witness, officer Robert Eury.

THE COURT: Let's take a 10-minute break.

(Recess taken from 11:35 a.m. until 11:50 a.m.)

THE COURT: All right. Mr. Levin.

MR. LEVIN: Thank you, Your Honor. The Government calls Robert Eury.

Your Honor, if I can retrieve Government's Exhibit 2 for identification, please.

THE COURT: Exhibit 2?

MR. LEVIN: It's a photograph.

THE COURT: Exhibits 1 and 2? You just need 2?

MR. LEVIN: The one that was not introduced into evidence.

THE COURT: That's 2-A. No, it's 2. It's 2.

MR. LEVIN: Thank you, Your Honor.

ROBERT EURY, GOVERNMENT'S WITNESS,
SWORN DIRECT EXAMINATION

BY MR. LEVIN:

Q Could you please state your full name?

A Robert Michael Eury.

Q That's E-U-R-Y?

A That's correct.

Q What is your position, sir?

[61] A I am currently working with the Albemarle Police Department assigned to the multi-agent drug task force in Stanly County.

Q Have you been involved in the investigation of this case against Defendant Harris?

A Yes, I have.

Q Let me ask you to take a look at Government's Exhibit 2 for identification. Do you recognize the photograph?

A Yes, I do.

Q How is that – not technically speaking, but did that come from a videotape?

A Yes, it did.

Q Have you had an opportunity to view the videotape?

A Yes, sir, I have.

Q And do you know if the videotape was – well, do you know when the videotape was made?

A Not exact date, but I have a time range.

Q Why do you have a time range?

A The videotape was taped by Michelle Harris, the defendant's sister –

MR. INGRAM: Objection, unless he can establish.

THE COURT: If you know, then. Do you know that?

THE WITNESS: It was seized during a search warrant, and she is talking on the video, on the tape, while she is taking it. They do identify her as Michelle.

THE COURT: Who identified her as Michelle?

[62] THE WITNESS: Several people in the store. It would be the person earlier identified as Scarecrow, and Joey.

BY MR. LEVIN:

Q People on the videotape?

A Yes.

THE COURT: That would be hearsay information, wouldn't it?

MR. LEVIN: It's not relevant, Your Honor. It's actually not going to the truth of the matter asserted that it was Michelle that took it.

BY MR. LEVIN:

Q Do you know – well, do you know – that's fine.

Do you know if the videotape was taken during business hours of the Harris Pawn Shop?

A Yes, it was.

Q How do you know that?

A The family is running on the tape as they entered the store. There was a person inside the store doing some type of transaction, African-American male was there doing the transaction of some type of gold, which was weighed out on the scales.

Q Was it daylight?

A Yes, it was.

Q Thank you.

MR. LEVIN: Your Honor, at this time the Government would [63] move into evidence what has been marked as Government's Exhibit 2 for identification.

THE COURT: Mr. Ingram, what do you say to that? First of all, let me ask you, have you seen the video?

MR. INGRAM: Yes, sir, I have.

THE COURT: All right. Do you have any doubts that this picture came from the video?

MR. INGRAM: No, Your Honor.

THE COURT: All right. The question then, I guess I have, is that it is the officer's testimony that viewing the video it shows that the video is run during the time somebody was engaged in a purchase at the pawn shop.

Do we have any question about that?

MR. INGRAM: No, Your Honor. I don't object to the fact that this video was taken during business hours.

THE COURT: All right. Then I will admit Government's Exhibit Number 2.

MR. LEVIN: No further questions, Your Honor.

THE COURT: Mr. Ingram, do you have any cross examination on that?

MR. INGRAM: Yes, Your Honor.

CROSS EXAMINATION

BY MR. INGRAM:

Q Officer Eury, was it your testimony that the video showed a customer making a transaction with some kind of gold which was [64] weighed out on the scales?

A Yes, sir.

Q And those scales were on the counter?

A Yes, sir.

Q Correct?

A They are depicted in one of the pictures here.

Q And either Government's Exhibit Number 1, 2 or 2-A, that's the scales you're talking about?

A Yes, sir.

Q It's in one of those photographs?

A Yes, sir.

Q All right. Thank you.

MR. INGRAM: That's all I have.

MR. LEVIN: No further questions.

(Witness excused.)

THE COURT: Thank you. You may come down, Mr. Eury.

MR. LEVIN: With that, Your Honor, understanding that all of the Government's exhibits have been moved into evidence, the Government rests.

THE COURT: They are in. Mr. Ingram –

THE CLERK: We couldn't determine if the tape was admitted.

THE COURT: At this point the tape is admitted as to the portion that was played.

Mr. Ingram, first you have a motion that you wish to [65] make? Mr. Ingram?

MR. INGRAM: Your Honor, I do move for judgment of acquittal pursuant to Rule 29. And again, as I said in opening statement, I contend that the Government has simply proved beyond a reasonable doubt that Mr. Harris carried the firearm during the drug transaction, not that the Government has established that by any credible evidence that it was in relation to the drug transaction. Essentially, because he always had on the firearm when the officer went in, there is no indication that he – from the Government that he put on the firearm when the officer went in or took it off when he left.

There is simply that he carried it during the drug transaction, and it was at a time, all of those times, that the officers went in, were during a weekday, business day, during business hours. In a pawn shop, whereby the officer's testimony firearms, jewelry, appliances and so forth are there for sale, I think the implication then is that, obviously, there is a need for protection there.

Again, no evidence, I contend, that certainly not – not beyond a reasonable doubt, that the firearm was carried in relation to the drug transaction on April the 30th.

THE COURT: What would you say, Mr. Ingram, as to the Rule 29 with respect to the April 30th transaction where they left the pawn shop and went out to the car and conducted the transaction, and during that transaction officer Boykin saw [66] nothing except the knapsack with drugs in it? Does that change your position any on whether it's a jury question?

MR. INGRAM: No, Your Honor, it doesn't for me.

THE COURT: Okay.

MR. INGRAM: Going out. I mean to say, they left the pawn shop. It seems to me there is a distinction if they left the pawn shop and went blocks away or were gone for an hour and went somewhere else and transacted the business, and he did not take off the firearm, that might be significant; but the fact that they stepped outside within a few feet of where he was doing business, I don't think that adds anything to the evidence.

The mere fact that they stepped to the back of the store, or stepped to the back door, or stepped a foot outside the back door, or sat in the car outside the back door, he is still there at his business, which we contend is the reason why he had the firearm on.

THE COURT: All right, Mr. Ingram.

Mr. Levin, I'm inclined to deny the motion by Mr. Ingram, but if you have anything you wish to state, I will hear from you.

MR. LEVIN: Your Honor, since it is a bench trial, I'm hesitant to talk about case law, which is right on

point. So, I would rather not do that, and I will just let the Court rule.

THE COURT: All right. I will deny your motion at this [67] time. I think it is a jury question at this point.

Mr. Ingram, do you have evidence?

MR. INGRAM: Yes, Your Honor. First witness will be the defendant.

WILLIAM JOSEPH HARRIS, DEFENDANT HEREIN, SWORN

DIRECT EXAMINATION

BY MR. INGRAM:

Q State your full name, please.

A William Joseph Harris.

Q Mr. Harris, what is your current residence address?

A P.O. Box 164, Ansonville.

Q That's in Stanly County?

A No, sir, that's in Anson County.

Q Anson County. Fairly near to Albemarle?

A Yes, 29 miles.

Q What is your date of birth?

A July 7, 1977.

Q Prior to your arrest in May of this year, how were you employed?

A I was self-employed at Harris Pawn Shop.

Q When did you first open the Harris Pawn Shop?

A November of 1996.

Q What resources did you use and how did you go about opening that pawn shop?

A My mom got killed in a car accident, and I took the money [68] from the estate and I used it to open the business with it.

Q Okay. Did you use part of that money to pay the rent at first?

A Yes, I did, a good part of it.

Q And how did you develop your inventory?

A Pretty much through pawns, people losing stuff through pawns, and a lot of people walk in and just sell stuff straight up. That's pretty much how I started out.

Q And where was your pawn shop located when you first opened it?

A 250 South First Street. It was also in Albemarle.

Q In Albemarle?

A Yes, sir.

Q Had you operated that pawn shop in some location in Albemarle since November of 1996, that is up through May of 1999?

A Yes. Yes, sir.

Q In your business, do people over that two and-a-half, three-year period, have people brought in items to "pawn"?

A Yes. Yes, sir.

Q Would you describe what pawning an item means?

A Pawning an item is where a customer would come in – like I will use a VCR, for example – and want to borrow $25 against it and use it as collateral. I would loan the customer $25, and they would fill out an agreement to pay me back within 30 days [69] my $30, plus, you know, 22 percent interest.

Q And how long do you hold that item before they come back and pick it up? Do people ever come back and pick up an item that was pawned?

A Yeah. Yeah.

Q How long do they have to come back?

A 90 days.

Q If they do come back, then they pay you back the money plus interest?

A Yeah.

Q If they don't come back, what happens to the item?

A It's forfeited, and I put it on the floor to be sold.

Q Now, when people come in and bring an item, for example a VCR in the example you gave, do you give them cash?

A Yes, sir.

Q When you sell items in your shop, have you ever accepted checks?

A No, sir.

Q So, your business is entirely a cash operation?

A Yes, sir, strictly cash.

Q Describe or, if you would, tell the Court approximately at any – on any given business day, approximately how much cash you would have on hand.

A Anywhere between 2,000 to $4,000.

Q And, if you would, also describe the kinds of merchandise [70] that you have for sale and have taken on pawn in your shop.

A I have taken jewelry, guns, stereo systems, car speaker boxes, televisions, home stereo systems; just about anything that is, you know, of significant value.

Q When you take jewelry from someone who comes in and wants to borrow money against it, how do you determine its value?

A I weigh it on my scales, and then I multiply the weight by $3 a gram.

Q Let me show you what was marked as Government's Exhibit 2-A. If you would look at that photograph. Was that photograph taken in your pawn shop?

A Yes, sir, it was.

Q Do you know the person in that photograph?

A Yes, that's Ian Garner, I-A-N, G-A-R-N-E-R. His nickname is Scarecrow.

Q And do you see the scales in that photograph?

A Yes, sir.

Q What's the purpose of your having those scales there?

A To weigh gold.

Q Okay. You also used those scales to weigh the marijuana that you sold to agent Boykin, is that correct?

A Yes, I did.

Q What's the primary purpose that they're there?

A The gold weight.

Q And your shop did have a license to buy and sell firearms, [71] is that correct?

A Yes, sir.

Q Was that in your name?

A No, it was in my father's name.

Q Why was it not in your name?

A Because at the time I was only 18 years of age, and because I was so young and starting a business, I couldn't legally, acquire an ATF license. So, we had an ATF officer come down, I can't remember what his name is, but he told us just to put the license in my father's name as long as my dad was there.

Q Now, did you move your pawn shop from 250 South First Street at some point?

A Yes, sir.

Q Where did you move and when was that?

A I moved to 1953 East Main Street, and that was in, I would say, about June of '98.

Q Why did you move?

A It was a better location.

Q Since the time that you opened the pawn shop, has it developed into a business of which you can make a good living?

A Yeah.

Q When you opened your store in November of 1996, or at your first location, South First Street, what security measures did you have in the store?

A I had a – I just had – in the first pawn shop?

[72] Q Yes.

A I just had two motion detectors and a door break protection for the front door.

Q When you first opened the store at 250 South First Street, did you carry a firearm at work?

A Yes, sir.

Q What firearm did you carry at that time?

A At the time, I had a Tokaev.

Q Would you spell that?

A T-O-K-A-E-V.

Q Where did you get that firearm?

A I bought it from the Valor Corporation.

Q V-A-L-O-R?

A Yes, sir. It's a gun manufacturing wholesaler.

Q You owned that Tokaev nine millimeter legally?

A Yes, sir.

Q Did you carry that firearm every day, every hour of the day when you were open?

A Every hour.

Q How did you carry it?

A The Tokaev I kept concealed because I didn't have a holster for it.

Q How did you carry it?

A You want me to show you?

Q Describe it.

[73] A I had the – I had it behind my back above my left hip in my pants.

Q Why did you carry that firearm in your shop?

A Basically for protection against the kind of people I dealt with on a regular basis.

Q Did police officers regularly visit in your shop?

A Yeah, pretty frequently.

Q For what purpose?

A Pretty much they would come to collect the pawn tickets so they could observe what I had taken in, and compare them to the stolen reports in the city to pretty much check out stolen merchandise.

Q Did you try to hide the scales when the police officers would come in?

A No, they just stayed right there on the desk the whole time.

Q Were you wearing a firearm when the police officers came in?

A Yes.

Q Now, when you moved to East Main Street in June of 1998, did you continue to carry that same firearm?

A Yes, sir.

Q And in the new shop did you carry it daily?

A Yes, sir.

Q On every business day?

A Yes, sir. More so there because of the increase of people.

Q You had more customer traffic at that location?

[74] A Yes, I did.

Q When you left, after you had moved to the new location, when you left in the afternoon and closed up shop, what did you do with the Tokaev?

A The Tokaev, I put it in my showcase. It would be the first showcase to the left, in the bottom right-hand drawer, and I would lock the drawer.

Q And when you opened up the shop the next morning, what would you do in terms of the firearm?

A I would go ahead, and as soon as I would walk in the store I would turn around behind me and go and lock the door, and go and pick up the firearm and put it on my body before I went to the back and retrieved my money out of the safe.

Q How would you describe the security, other than carrying the firearm that you had, at the new location on Main Street, the security in your shop?

A At the new pawn shop?

Q Yes.

A I had two door-break protectors, I had three motion detectors, and I had what they call a blast-break protection. And it's a little box that hangs and it detects sounds, detects vibrations, and that way if somebody was to throw a rock through the window, it would automatically set off the alarm. That's pretty much what I had there.

Q Those security measures you set at night as you left in the [75] afternoon?

A Yes, sir.

Q At some point did you stop wearing the Tokaev nine millimeter and begin to use another firearm?

A Yes, sir.

Q What was the other firearm?

A The Taurus PT92F.

Q Was that the firearm that was marked as a Government's' exhibit this morning?

A Yes, sir. It's laying right there.

Q And when did you begin using that firearm?

A I would say about the beginning of February of this year.

Q Did you carry it – how did you carry it?

A I carried it in a holster on my belt.

Q From the time that you obtained that firearm, did you carry it everyday in the shop?

A Yes, sir, everyday.

Q Did you carry it and store it overnight in the same manner that you had the Tokaev?

A Yes, sir, I did. I left it there at night.

Q So, the only difference was, this one you had a holster and wore it on your belt?

A Exactly.

Q Compared to the Tokaev that you wore behind your body inside your pants?

[76] A Yes, sir.

Q Let me show you what I have marked as Defendant's Exhibits 1 and 2. First of all, Defendant's Exhibit 1, do you recognize those photographs?

A Yes, I do.

Q There are two photographs on that page, is that correct?

A Yes, sir.

Q One of the photographs is a close-up of you, is that correct?

A Yes, it is.

Q What is that in the background, is that your shop?

A Yes, it is.

Q And the other photograph has a picture of another person. Is that also taken in your shop?

A Yes, sir.

Q Do you know approximately – first of all, who is in that other photograph?

A Ian Garner.

Q Does the fact that – what is he wearing on his hip?

A He is wearing a Taurus PT92.

Q Does his presence there in that photograph tell you about what time – what date in time that photograph was taken?

A It had to be about mid-January.

Q Okay. Why was he there on that occasion?

A He just helped me out sometimes. He lived down with my dad. [77] He didn't have nothing else to do, so he just come around and would hang out.

Q Is the nine millimeter that he has on in that photograph the nine millimeter Taurus that you were wearing when Agent Boykin came in?

A Yes, it is.

Q And that's the same as the one that was marked as a Government's exhibit this morning?

A Yes, sir.

Q How did you obtain possession or ownership of that firearm?

A Ian Garner gave it to me at about the end of January.

Q Okay. And showing you Government's Exhibit 2, are there two photographs on that page?

A Yes, sir.

Q The bottom photograph, what does that depict?

A It looks to me like a customer entering the store.

Q That's the front of your store?

A Yes, sir.

Q Okay. The top photograph in Government's Exhibit 2, if I can direct your attention to that. What does that show?

A It shows me approaching the front.

Q And is that very close to being the same photograph that was previously marked as Government's Exhibit 2?

A Yeah, that's – this photograph was taken about three steps before this one.

[78] Q You're aware that those photographs, still photographs, were taken from a videotape, is that correct?

A Yes, sir.

Q And you have seen that videotape, is that correct?

A Yes, I have.

Q And the videotape at some point depicts you walking from the back of the store toward the person holding the video camera in the front of the store, is that correct?

A Yes, it does.

Q So, the photograph of you on Defendant's Exhibit 2, and the photograph of you in Government's Exhibit 2, both are still photographs from that video of you walking toward the front of the store?

A Yes, they are.

Q Are you carrying a firearm in those photographs?

A Yes.

Q How do you know that you are?

A Because I never didn't. I never – I never – I was never open when I wasn't armed.

Q And those photographs are prior to Mr. Garner giving you the Taurus?

A Yeah.

Q So, at that time you were still wearing the Tokaev?

A I was still using the Tokaev, yes, sir.

Q How does it compare in size to the Taurus that you were [79] wearing in April and May of this year?

A Well, the Tokaev only had a nine-round magazine, and the Taurus had a 15-round magazine. So, the butt of the gun was a little thicker on the Taurus, and the Tokaev gun was real thin. It was a single-action gun, wasn't really reliable.

Q And again, when did Mr. Garner give you that firearm?

A About the end of January, 1999.

Q Why did he give it to you?

A As a Christmas present.

Q Now, you did sell some marijuana to Agent Boykin in your shop in April and May of this year, is that correct?

A Yes. Yes, sir, I did.

Q Was that at least the occasions of April 29th, April 30th, and May 6th?

A Yes, sir.

Q Were you wearing the Taurus on each of those occasions?

A Yes, I was.

Q On April the 29th, when did you first put on your hip the Taurus firearm on that particular day?

A It would be about ten o'clock a.m., when I opened.

Q How about on April the 30th?

A 10:00 a.m., when I opened.

Q And on May the 6th?

A 10:00 a.m., when I opened.

Q And on each of those days, when would you take off the [80] Taurus?

A As soon as all of the customers were gone and it was after six o'clock.

Q What would you do with the Taurus at the time you closed up each day?

A The same as the Tokaev: I would remove the holster from my belt, and I would put it in my showcase drawer in the bottom right-hand drawer, and I would lock it.

Q After Mr. Garner gave you the Taurus nine-millimeter firearm, did you ever again wear the Tokaev nine-millimeter at the shop?

A No, sir.

Q What happened to that firearm?

A I sold it.

Q Did you sell it out of your shop?

A Yes, sir.

Q So, you basically put it in your display case?

A Yes. I logged it into my gun log, and I distributed it to a licensed individual.

Q Each time that Agent Boykin came in you were wearing the Taurus, weren't you?

A Yes, sir.

Q Why?

A For protection against, like I said, the kind of people that I dealt with regularly.

[81] Q Now, on April the 29th, we heard some testimony and listened to a taped discussion about the Taurus and ammunition that was in it?

A Yes, sir.

Q On the tape, and in that conversation, did you say something to the effect that the magazine to that firearm had been outlawed?

A Yes, I said that, but I meant that – it wasn't outlawed, they just quit manufacturing that particular model of gun.

Q So, the model that you had, had a 15-shot magazine, is that correct?

A Right, and they discontinued producing that gun.

Q And the model that succeeded the model that you had, what kind of magazine did it have?

A Excuse me?

Q You said the model that you were wearing had been discontinued?

A Right.

Q And it had a 15-shot magazine?

A Yes, sir.

Q How was the newer model different from the one you had?

A I don't know.

Q Okay. You don't know if it had a 15-shot magazine?

A Naw.

Q Was there anything illegal, as far as you know, about that [82] firearm?

A No.

Q Now, you also had a discussion about the ammunition. Would you tell, for the Court, what you were describing there? Describe the ammunition that was in the gun.

A I was describing the hollow points that are in it, and they ain't nothing but hollow points, reloads.

Q What is a reload?

A Like I said, my friend Ian, in the pictures here, was in the military, and he likes to reload whenever – whenever you shoot your bullet and it comes out, you take the casing and you put gun powder back in it, and you put another bullet cap back on top of the shell.

Q So, you use a shell that has already been fired, and there is nothing left from it but the shell, and make a new bullet out of it?

A Yes, sir.

Q Did you make a statement in that conversation about the firearm that – to the extent that this could "F-up" a cop?

A Yes, I did.

Q And why did you make that statement?

A That was – I don't know. I don't know.

Q Now, you did have police officers who regularly came in your shop?

A Yes, sir, I did.

[83] Q You know them on a first-name basis?

A Yes. I got along with them fine.

Q Now, in April and May of 1999, were you selling marijuana occasionally to persons other than Agent Boykin?

A Yes, sir.

Q Were you making a lot of money selling marijuana?

A No.

Q How many other persons, approximately, were you selling to in the spring of 1999, other than Agent Boykin?

A I had four customers before I was introduced to him.

Q How would you describe your relationship with those four people?

A They are – all of them are real good friends of mine.

Q So, Agent Boykin would have been the fifth person that you were selling to?

A Yes, sir.

Q And the only person who was not a friend of yours?

A Yeah.

Q Did you always sell marijuana, every time you sold marijuana, in your shop?

A No.

Q Where else did you sell marijuana?

A From my house.

Q When you did sell at the shop, did you always have the Taurus on?

[84] A Yes.

Q Why?

A Just because, like I say, I wore it on a regular basis daily in the business.

Q Now, when you sold marijuana at your home, did you wear a firearm?

A No, sir.

Q Was there ever a firearm in your house anywhere when you sold marijuana there?

A No, sir.

Q Have you ever had a firearm in your home?

A No.

Q If you sold marijuana out of your home, what happened – where was the Taurus?

A If I was at home, it was at the pawn shop in the drawer locked up.

Q Did any of the four friends of yours who bought marijuana from you wear firearms when they came to purchase?

A No.

Q Now, from the first of this year through the end of May of this year, would you sell marijuana out of your shop everyday?

A No.

Q Approximately how often per week might you make a sale at your shop?

A Probably just a couple times a week.

[85] Q Did you sell more frequently to your four friends at your shop or at your home?

A To my friends, they were just coming by the house.

Q And if you sold – if they more frequently came by your home, why would there be occasions then you would sell to them in the shop?

A Like one of my friends lived down in Mount Gilead, and the other one lives in Moncure, and he come, and he worked at Imperial Homes, and it's just right around the corner. And he would call me the night before and say what he intended to get from me, and I would bring it to the store for him the next day.

Q Do have you a valid North Carolina driver's license?

A No, sir.

Q Why is that?

A I had a DUI in 1997.

Q Thank you. Thank you.

MR. INGRAM: That's all I have, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: Thank you, Your Honor.

THE COURT: Mr. Levin, without limiting you, how long do you think cross examination may take?

MR. LEVIN: Your Honor, it's really hard for me to say.

THE COURT: Maybe this is a good time to take a break then. We'll take a lunch break now. Any reason we can't come back in, let's say, at 20 minutes to 2:00? Has anybody got [86] anything that would prohibit them

from doing that? Let's take a break until 20 minutes to 2:00.

(Recess taken from 12:25 p.m. until 1:40 p.m.)

THE COURT: Mr. Harris, if you would, come back to the stand, please, sir.

Mr. Harris, you're still under oath from this morning. Mr. Levin.

MR. LEVIN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Harris, you've owned a pawn shop since November '96, is that right?

A Yes, sir.

Q And you have had two pawn shops total?

A Yes, sir.

Q And how long have you been selling drugs?

MR. INGRAM: Objection.

THE COURT: Overruled.

THE DEFENDANT: I guess since I was about 16.

BY MR. LEVIN:

Q How old are you now?

A 22.

Q You started selling marijuana since you were 16?

A Yes, sir.

Q Where do you get the marijuana?

[87] A Do what?

Q Where do you get the marijuana?

A I got it from my sister's boyfriend.

Q Does he live at your sister's house?

A Yeah.

Q You have been to that house?

A Yes.

Q You have seen marijuana in that house?

A Yeah.

Q Have you ever carried a weapon to that house?

A No.

Q You have seen weapons in that house?

A Yeah.

Q Several weapons?

A Yeah, four rifles.

Q And a pistol?

A I have never seen a pistol over there, just what they have hanging on the wall.

Q Do any rifles not hang on the wall? Are there any rifles that are not on the wall?

A No, sir, not that I can recall.

THE CLERK: Government's Exhibit Number 8 marked.

BY MR. LEVIN:

Q Mr. Harris, let me show you what has been marked Government's Exhibit 8 for identification. Do you know where [88] this picture has been taken?

A Looks like – it looks like the corner of my sister's bedroom. That's the fish tank right there.

Q Do you see a rifle in that picture?

A Yeah.

Q Is it hanging on the wall?

A No.

MR. LEVIN: If I can retrieve the exhibit.

I would like to move this into evidence, Your Honor, as Government's Exhibit Number 8.

THE COURT: Any objection, Mr. Ingram?

MR. INGRAM: No, Your Honor.

THE COURT: It's admitted.

BY MR. LEVIN:

Q How long have you been buying drugs from your sister's boyfriend?

A About eight months.

Q Before that, where did you buy the drugs?

A A guy named Levi.

Q Is that in Stanly County?

A Yeah.

Q How long did you buy drugs from him?

A Just a couple years, probably.

THE COURT: What is Levi's last name?

THE DEFENDANT: Crawford.

[89] BY MR. LEVIN:

Q Before you bought the drugs from Levi Crawford, where did you buy the drugs?

A From a guy named Shane Rummage, R-U-M-M-A-G-E.

Q How long did you buy drugs from Mr. Rummage?

A Since 1992.

Q What kind of drugs did you buy from these individuals?

A Marijuana.

Q Only marijuana?

A Uh-huh (affirmative.)

Q Is that a yes?

A Yes, sir.

Q Did you offer for sale opium to Agent Boykin?

A Yeah.

Q It wasn't opium, was it?

A No, sir.

Q You were not being truthful when you identified it as opium?

A I thought it was. That's what I was told.

Q Where did you buy it?

A From a guy named Gene Scott.

Q How much marijuana would you say you purchased in total from all these people over the last six years?

MR. INGRAM: Objection.

THE COURT: Overruled.

BY MR. LEVIN:

[90] Q Let me ask that again. Approximately how much marijuana would you say you purchased, from the individuals you identified, over the past six years, dating back to 1992?

A I don't know. Probably, I would say, between 8 and 12 pounds total.

Q How many times have you visited these individuals?

A Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though.

So, really, if you add it up, it wouldn't – it wouldn't be that much.

Q Did you have a pound in your knapsack on April 30th when you sold to Agent Boykin marijuana?

A I don't recall exactly what incident that was. Be more specific and I would answer for you.

THE COURT: Let him get his question out, then you can answer.

BY MR. LEVIN:

Q When you were in the vehicle behind the pawn shop on April the 30th, how much marijuana did you have in your knapsack?

A Eight ounces.

Q Is that in addition to the 114 grams that you sold to Agent Boykin?

A That was altogether.

Q Did you indicate to Agent Boykin, after he paid you the money, that you now had enough to go pay your supplier?

A I don't recall.

[91] Q Do you recall going to pay your supplier after Agent Boykin gave you the $360?

A I don't recall.

Q Did your supplier front you the drugs?

A Sometimes.

Q And then did you go pay your supplier after you made money from the sales?

A Yeah, whenever I got the money together.

Q Since 1996, since you opened up the first pawn shop, how many marijuana customers did you have?

A At first I only had a couple. Then I just – they just – a couple of their friends. Like I say, I didn't sell to but – about four people in the last three years.

Q In the last three years you have only sold to four people?

A I had four friends that bought from me.

Q You didn't have anybody else?

A No.

Q You had Agent Boykin.

A I mean, I had four people I dealt with until I was introduced to Mr. Boykin there.

Q So, prior to April 29th, you only dealt with four people?

A Yes, sir.

Q And what were their names again?

A Garland Pucket, Lee McRae, and a guy named Rick Wood, and my brother Rodney Deaton.

[92] Q And is Rodney your half brother?

A Yeah, he is my half brother.

Q Did Rodney bring other customers in like he brought in Agent Boykin?

A Yeah, he did before.

Q That would be four people, plus people Rodney brought in?

A Well, he brought – like I said, he would come up there and get it for other people.

Q Did he ever bring anybody else with him?

A I think he brought a guy up there, one guy named Chip Coyer.

Q So, now we have six people, including Agent Boykin?

A Six?

Q You have your four friends, Agent Boykin, and now Chip Coyer?

A Right.

Q Anybody else?

A Not that I know of.

Q Do you recall April 28, that is the day before you met Agent Boykin, did your half brother come visit you?

A Yeah, he sure did. He had a female with him. That's right. Yeah, sure did.

Q So, is that seven now?

A Uh-huh (affirmative.)

Q And you sold marijuana to her?

A Uh-huh (affirmative.)

[93] Q Is that a yes?

A Yes, sir.

Q Do you recall how much you sold to her?

A I think it was a half ounce that day.

Q How much did you get for a half ounce?

A $60.

Q Did you pay her $100?

A Huh?

Q Excuse me, did she pay you $100?

A No, sir.

Q How often would Rodney come visit you in the store?

A Oh, I would say Rodney only come around about twice a month.

Q And each time he came by, was it for the purposes of buying marijuana?

A No, sir. He is my brother. He just come around a lot of times to look at what I had.

Q Do you recall now – do you recall that he brought anybody else with him other than –

A No, because most of the time he come up there, you know, he would be getting whatever for somebody else, you know.

Q You indicated that – strike that. You have two businesses, don't you?

A No, sir, I only had one.

Q What is your one business that you identified?

A Harris Pawn Shop.

[94] Q Okay. Were you also selling marijuana? Would you call that another business?

A No.

Q You made money on it, didn't you?

A No.

Q You didn't make any money?

A No.

Q So, why did you sell marijuana?

A Basically, to be honest with you, I sold marijuana so what I would have left over I would have for free and wouldn't have to buy myself.

Q In that respect you made money, didn't you? You were getting something for free?

A Yeah, if you look at it like that.

Q So, then, it's a business, isn't it?

A No.

Q You had scales in your pawn shop?

A Yes, sir.

Q And you used those scales for weighing gold?

A Yes, sir.

Q And the gold is weighed and sold in the pawn shop?

A Yes.

Q You also used the scales to weigh your marijuana –

A Yes, sir.

Q – when you sold marijuana at the pawn shop?

[95] A Yes.

Q You also sold marijuana behind the pawn shop?

A Right.

Q So, the scales had two purposes, didn't they?

A Basically, yeah.

Q Now, when you carried a weapon, did you indicate earlier you never carried a weapon outside the pawn shop?

A Yeah.

Q So, you never carried a weapon – from 1996, you never carried a weapon outside of that pawn shop?

A Well, I had a storage building out back, and like people – I had lawn mowers and stuff out there that people pawned, and I would go out and walk out the back door to the storage building, and come back in the building. If I was to go next door to the neighbor's business, I would walk over there with it on. Like when me and him went outside the back door, we weren't out there five minutes, and come right back in.

Q You indicated earlier you were pulled over – that you were convicted of a DWI?

A Yes, sir.

Q And that was April of '97, is that right?

A I can't exactly recall, but I'm pretty sure it was in '97. I think it was in April, yeah.

Q Do you recall if you were carrying a weapon on your person at that time?

[96] A I had a weapon in the trunk of my car that was broken.

Q So, you had – how did that weapon get in your car?

A Me and my father had just ordered a pair of Rossi .38 Specials from Valor. And we were going to carry those firearms before we bought the Tokaev, the second firearm. And we had both purchased a .38 Rossi apiece, and it's got a little lip on it that comes out and the bullet would slide back and it wouldn't allow the chamber to rotate.

And I took it from the pawn shop that day to my house in Mount Gilead to shoot it, because I just bought it in the mail. And it didn't work, so I put it in an answering machine box and put it in my trunk.

Q Any other times where you were carrying a weapon outside of your pawn shop?

A No, I didn't carry it outside the pawn shop.

Q Well, it was in your car.

A Yeah, that was the – yeah, I took that home just because I just bought it that day.

Q Now, you had never met Agent Boykin prior to April 29, is that right?

A Um-hum (negative), no, sir.

Q So, you didn't trust him, did you?

A Well, I didn't really trust him, but, you know, my brother brought him in here and introduced me to him, so I kind of took my brother's word on it.

[97] Q You questioned him about the antenna on his car?

A Yeah, I'm pretty sure I did.

Q Now, have you ever conducted your pawn shop business outside of the pawn shop?

A No, not unless you count like going outside the – going outside the door to see what somebody had in their car. If somebody would say I got a TV out here, come look at it, I would go out of the pawn shop and look at it.

Q All of your pawn shop sales, are they all within the pawn shop?

A Yes.

Q There is a cash register in there?

A Yes, sir.

Q On April 30th, you had directed Agent Boykin out to the car in the back of the pawn shop, is that right?

A Yes, sir.

Q Is that your car?

A No, sir, it wasn't.

Q Whose car was that?

A That was Lee McRae's car.

Q Did he give you the keys?

A Yes, he did.

Q You didn't have a driver's license at the time?

A No, I didn't.

Q And you drove the car around in circles and you repositioned [98] the vehicle, didn't you?

A Yes. It was parked in front of my storage building. I got in the car, I reversed it, and then I pulled up beside the door and stopped.

Q You had a better vantage point to see if anybody was coming up to you on the street?

A Right, uh-huh (affirmative).

Q Is that a yes?

A Yes, sir.

Q That's why you did it?

A Right.

Q Who were you expecting to come up to you?

A Nobody. I was just watching out. I was watching to see if any cars pulled up to the front, customers, so I could go back in the store.

Q Was anybody in the store?

A Yeah, I'm pretty sure Lee was in the store, and Scarecrow was in the store.

Q So, there were two people who were doing business in the store?

A Right.

Q So, they didn't need your help to go in the store if the customers came in?

A Yeah, because neither one of them worked for me. They would just look out if a customer come into the store, and they would [99] be like, here, hold on, he'll be right back. I did mostly all of the transactions of any kind.

Q They would have come got you if need be?

A Yes, sir.

Q Meanwhile, you were in the vehicle with Special Agent Boykin, and you sold him marijuana, is that right?

A Yes, I did.

Q You were carrying a weapon at the time?

A Yes, I was.

Q You were carrying the weapon that's been admitted into evidence?

A Yes, I sure was.

Q And why did you carry the weapon in the pawn shop?

A Basically, because the people I dealt with regularly, you know, a lot of people would get violent if you

didn't want to give them the money they wanted. They would start, you know, cussing at you and wanting to fight and all kinds of stuff. And you would have groups of people coming in sometimes, and they would be looking like they were going to rob you. Basically for reasons like that. Basically the reason I carried the firearm is because of the cash I kept there.

Q Now, what did you do with the cash that you made from the drug sales?

A Do what? That I made?

Q Yes.

[100] A I never didn't really profit nothing.

Q You got $360 from Special Agent Boykin?

A Right.

Q What did you do with that money?

A I put it in my wallet.

Q Did you always put the money in the wallet?

A Yes. Then I would take it over to my sister's boyfriend.

Q To pay him back because he fronted you the drugs?

A Right. Or if I bought it, then, you know, I would put the money back.

THE COURT: What's that now? If you bought it?

THE DEFENDANT: If I didn't get it fronted, if I went over to his house and paid him cash for it, then I would pay myself back with the money.

THE COURT: Where would you put that cash?

THE DEFENDANT: Back in the pawn shop.

BY MR. LEVIN:

Q In the cash register in the pawn shop?

A Yeah.

Q So, you carried your weapon to – was it to deter people so that these criminal elements or these elements that were attracted to the pawn shop, was it to deter them from robbing you?

A Yeah, hopefully.

Q Were you prepared to use it if you had to?

[101] A Yeah.

Q Have you been trained on that weapon?

A No.

Q Did you ever go to the shooting range?

A Uh-huh (affirmative.)

Q Yes?

A Yes, sir.

Q So, you knew how to use it?

A Yes, sir.

Q And you were prepared to use it?

A Yeah.

Q Now, if somebody robbed you while you were – if they robbed you of your pawn shop merchandise, would you make a report to the police?

A Yes, sir.

Q You wouldn't hesitate to do that, would you?

A No.

Q If they robbed you of your drugs, would you still report it to the police?

A Well, no.

Q That's because it's an illegal substance, right?

A Exactly.

Q And you would get in trouble?

A Right.

Q So, the weapon would help you defend yourself against [102] would-be thieves?

A Right.

Q And you were prepared to use it? And you were prepared to use it?

A Yeah.

THE COURT: Your answer?

THE DEFENDANT: Yes, sir.

BY MR. LEVIN:

Q And you knew the police wouldn't help you if these thieves came and robbed you of your drugs?

A Right.

MR. LEVIN: Your Honor, I don't have any further questions.

THE COURT: Mr. Ingram?

REDIRECT EXAMINATION

BY MR. INGRAM:

Q Mr. Harris, before you opened your pawn shop, had you had any experience or did you know anyone who had any experience in the pawn shop business?

A Yeah. My dad run a pawn shop in Siler City for five years.

Q Did you consult with him before you opened your business, about the type of inventory and how to run the business?

A Yes, I did. He helped me out for about the first year.

Q Did he make any suggestions to you about security?

A Yes, he did.

[103] Q What suggestions did he make to you?

A Burglar alarm and a fire alarm.

Q Thank you.

MR. INGRAM: That's all I have.

THE COURT: Anything further, Mr. Levin?

MR. LEVIN: No, Your Honor. Thank you.

EXAMINATION

BY THE COURT:

Q Mr. Harris, help me understand this line that you're drawing here.

You carried a firearm because you thought some people that were engaged in the legitimate business of pawning may get upset or may get violent, is that right?

A Yes, sir.

Q What was your opinion of people who used and attempted to buy illegal drugs?

A Excuse me, could you rephrase that?

Q Was your opinion that those people could get upset and be violent?

A No, because the only people I sold to, like I said, were my friends.

Q You didn't know anything about Mr. Boykin's temper, did you?

A No, I didn't.

Q But if one of your friends had gotten violent or upset, would you have used the gun in the sale of marijuana?

[104] A No, sir.

Q You would not?

A No, sir.

Q But you would use it in connection with somebody who does the same thing, getting upset in connection with pawning?

A Well, basically just for robbery protection.

Q All right. If somebody tries to rob your stash or not pay you, you would use your gun?

A Yes, sir.

Q What if a marijuana purchaser decided not to pay you, would you use your gun?

A No.

Q Why not?

A Because, like I said, it's the people I dealt with were my friends.

Q But I'm saying, if someone had not been willing to pay you, would you have used your gun?

A No.

Q That's what I don't understand. Why would you use it on people that were not buying marijuana, but wouldn't use it on people who might be using marijuana or purchasing marijuana?

A Because, basically with the pawn shop I was protecting my money and my inventory.

Q Well, if you had marijuana and cash, you would be protecting it both ways, wouldn't you, legitimate sales and illegitimate [105] sales? That's what I don't understand. And I want you to explain to me why you would use your gun to protect your legitimate source of income and not use it to protect your illegitimate source of income.

That's what I hear you saying. Now, why?

A I don't know. I just – like I say, I never had an incident. I never thought of it.

Q All right. If that be the case, did you carry your gun to protect yourself only in the sale of legitimate goods, or did you carry your gun to protect yourself and your property in the event that anybody tried to rob you?

A Yes, sir.

Q Well, then, how do you exclude drug people in that event, then? Do you understand what my question is?

How can you say that you carried the gun to protect yourself from your – for your legitimate sales and property, and not your illegitimate sales and property?

A I just did it. I mean, I never – I never – I never thought about using it up against anybody that was trying to buy drugs.

Q Did anybody ever give you a problem in buying drugs?

A No, sir. That's what I mean, I never had an incident. If somebody would have robbed me, I would probably had to just fold on it because I couldn't call the police and tell them this guy tried to steal my drugs.

[106] Q So, are you saying you wouldn't have used it?

A What's this?

Q If somebody was there to buy drugs either grabbed your supply and ran or grabbed your money –

A No, I wouldn't use the gun. I would only use the gun if my life were in danger.

Q Well, that's true with your legitimate?

A Right.

Q So, if somebody held you up who had come there to pawn some things, you would use your gun?

A Well, it really depends on the situation, because –

Q Give me a situation that you would use it in a legitimate transaction.

A If I felt as if I had time to pull the gun out and actually use it to protect myself, then I probably would; but if somebody had a gun on me, I would probably go ahead and give them all of the money.

Q Now, on the first incident, if you had time to pull it out, would it make any difference whether they were there to buy marijuana or to pawn money, if they then decided to rob you?

A Excuse me?

Q You would use your gun if you thought you had time to use it, is that what you said?

A Yes.

Q Are you making a distinction between people who had come [107] there to buy marijuana and people who had come there to pawn property?

A Yes. What the distinction would be, the people I dealt with were my friends, and I never felt as if I was in danger with them. So, I, in no way, shape or form, carried the gun to protect my guns.

Q So, Mr. Boykin was your friend?

A Well, no – like I said, my brother brought him to me, so I didn't feel any danger from him.

THE COURT: Anything else anybody has?

MR. INGRAM: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. INGRAM:

Q Did you testify earlier in response to a question by Mr. Levin that you had the weapon primarily there as a deterrent?

A Yeah, exactly. Hopefully people would see it and just think, well, we better not try it, that was basically – I really hate to shoot anybody, no matter what the circumstances would be.

Q Now, did you know every person who came into your pawn shop to do business for the pawn shop?

A No, not at all.

Q But you did know the four people you regularly dealt with with [sic] the marijuana business?

A Yes, I did. I have known them ever since I have lived in [108] this state.

Q And several other people that your brother brought to you, you dealt with because they were with your brother, is that correct?

A Yes. Yes, sir.

Q And Agent Boykin was one of those people, is that correct?

A Yes, he was.

Q And you occasionally sold marijuana out of your house, is that correct?

MR. LEVIN: Objection to the leading, Your Honor.

THE COURT: All right. Well, we have been over this territory, I believe.

Go ahead, Mr. Ingram.

BY MR. INGRAM:

Q You sold marijuana other places than in your pawn shop, is that correct?

A Yes, sir.

Q When you picked up marijuana at your sister's boyfriend's house, did you carry a weapon?

A No, I didn't.

Q On those occasions, did you ever see them carrying or holding or possessing a weapon?

A Gertie?

Q Gertie.

A No.

[109] Q That's your sister's boyfriend?

A No.

Q Did any of the person's who have bought from you marijuana, that is the four friends of yours, or any of the two or three people that your brother recommended, did any of them ever wear a weapon –

A No, sir.

Q – when they were buying marijuana from you?

A (Shakes head in the negative.)

MR. INGRAM: Thank you. That's all.

THE COURT: Anything else, Mr. Levin?

MR. LEVIN: No, Your Honor.

EXAMINATION

BY THE COURT:

Q This deterrent, that you said you just had this gun for a deterrent to keep people from stealing your property –

A Yeah.

Q – whatever your property may be –

A Well, yeah.

Q – that would include marijuana?

A Well, I didn't protect it with the gun.

Q Okay.

THE COURT: You may come down. Thank you, sir. Next witness, Mr. Ingram.

(Witness excused.)

MR. INGRAM: Your Honor, the next witness is Todd Crump.

THE COURT: Mr. Crump, please come forward.

TODD ALRIDGE CRUMP,
DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. INGRAM:

Q What is your full name?

A [Todd] Alridge Crump.

Q What is your middle name?

A Alridge.

Q Mr. Crump, where do you live?

A 40418 Mt. Zion Church Road. It's in Norwood, North Carolina.

Q Do you know Joey Harris?

A Yes, sir.

Q How long have you known him?

A Going on five years.

Q Are you currently employed?

A Yes, sir.

Q How are you employed?

A Self-employed.

Q In what kind of business?

A Lawn maintenance.

Q Earlier this year were you employed by another lawn maintenance company?

A Yes, sir.

[111] Q What company was that?

A Carolina Lawn Care.

Q When did you last work for Carolina Lawn Care?

A I would say May of '99.

Q Now, on a particular day when you were working for Carolina Lawn Care, where did you report to work each morning?

A At the BP station about a quarter of a mile from Harris Pawn Shop.

Q Did you drive there and leave your car there?

A Yes, sir.

Q Would your employer then pick you up and take you to the job sites?

A Yes, sir.

Q At the end of the day, did you go back to the BP station to pick up your car?

A Yes, sir.

Q And did you state it was about a quarter of a mile from the Harris Pawn Shop?

A Yes, sir.

Q Have you, on occasion, gone by the pawn shop after work?

A Yes, sir.

Q Approximately how often per week from the beginning of this year through the end of May?

A Three or four times a week.

Q For what reason did you go by there?

[112] A Friends, see what was going on.

Q On those occasions did you observe whether or not Mr. Harris was wearing a firearm?

A Yes, I did.

Q Was he wearing a firearm?

A Yes, sir.

Q Did you ever observe him in the pawn shop when he was not wearing a firearm?

A No, I did not.

Q Have you ever been there at the pawn shop when Mr. Harris closed up the shop at the end of the day?

A Occasionally.

Q Have you occasionally given him rides home after work?

A Yes, sir.

Q What did you observe about what he did with the firearm you saw him wearing when you were there at close-up time?

A He would always lock it up in a drawer.

Q Did you ever see him leave the pawn shop with the firearm?

A No.

Q Showing you what was previously marked as Government's Exhibit 6, does that appear to be the firearm that Mr. Harris was wearing?

A Yes, sir.

Q Or one similar to this, at least?

A Yes, sir.

[113] Q Have you ever bought marijuana from Mr. Harris?

A No, sir.

Q Have you ever visited in his home?

A Occasionally.

Q Have you ever observed any firearms of any kind in his residence?

A No, sir.

MR. INGRAM: Thank you. That's all I have.

THE COURT: Mr. Levin?

MR. LEVIN: No questions, Your Honor.

THE COURT: Thank you. You may come down.

(Witness excused.)

THE COURT: Mr. Ingram?

MR. INGRAM: Your Honor, our next witness is Roger Her. Madam Clerk, he would prefer to be affirmed.

ROGER HER, DEFENDANT'S WITNESS, AFFIRMED

DIRECT EXAMINATION

BY MR. INGRAM:

Q What is your full name, please?

A Roger Her.

Q Your last name is spelled H-E-R?

A Yes, sir.

Q Mr. Her, are you currently employed?

A Yes, sir.

Q How are you employed?

[114] A During the night times I deliver pizza for Dominos.

Q What do you do during the day?

A I'm in the police academy.

Q Where is that police academy?

A In Albemarle.

Q In a community college there?

A Yes, sir, Stanley Tech, BLET.

Q Do you know Joey Harris?

A Yes, sir.

Q How long have you known him?

A I've know him for seven years.

Q Since January of this year, have you had occasion to visit with Mr. Harris in his pawn shop in Albemarle?

A Yes, sir.

Q For what reason?

A He was a friend of mine.

Q When you visited there, was Mr. Harris always present?

A Yes, sir.

Q Did you observe on those occasions whether or not he was wearing a firearm?

A Yes, sir.

Q Was he wearing a firearm?

A Yes, sir.

Q Did you ever observe him not to be wearing a firearm?

A No, sir.

[115] Q Does this appear to be the firearm that you saw him carrying in a holster?

A Yes, sir.

MR. INGRAM: And I am referring to Government's Exhibit 6 here, for the record.

BY MR. INGRAM:

Q Have you ever bought marijuana from Mr. Harris?

A No, sir.

Q Have you ever visited in his home?

A Yes, sir.

Q On those occasions, have you ever seen a firearm of any kind in his residence?

A No, sir.

MR. INGRAM: Thank you. That's all I have.

THE COURT: Mr. Levin?

MR. LEVIN: No questions, Your Honor.

THE COURT: Thank you. You may come down.

(Witness excused.)

MR. INGRAM: Your Honor, our next witness is Mr. Lee McRae.

THE COURT: Mr. McRae.

LEE JAMES McRAE, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. INGRAM:

Q What is your full name, please?

[116] A Lee James McRae.

Q Mr. McRae, are you currently employed?

A Yes.

Q Where?

A East Gate Cinema in Albemarle.

Q Where do you live?

A 145 Goling Drive, Mount Gilead, North Carolina.

Q Do you know Joey Harris?

A Yes, I do.

Q How long have you known him?

A About three years.

Q Have you visited in Mr. Harris' pawn shop in Albemarle on a regular basis since January of this year?

A Yes, I have.

Q On an average, about how many times are you there in the pawn shop visiting per week?

A About 95 percent of the workday.

Q Have you ever been there when Mr. Harris closes the shop?

A Yes, I have.

Q What have you observed – when you have been in the shop, have you observed him to – whether or not he has worn a firearm?

A Yes, he has.

Q And would you describe it, and how he wore it?

A He wore a Tokaev, and he wore it on his belt. He had a [117] holster that went around his belt, and he wore it on his belt.

Q Does this firearm, which was marked as Government's Exhibit 6, appear to be the firearm you have seen him wear on his belt?

A Yes, it does.

Q Have you ever observed him in the pawn shop when he was not wearing a firearm?

A No, I haven't.

Q And you have been in there at closing time?

A Yes.

Q What have you observed him do with the firearm at closing time?

A Take it off his belt, and put the belt and gun, the thing under the showcase, in the drawer and lock it.

Q Have you ever been there at opening time?

A Excuse me?

Q Have you ever been there when he opened the shop?

A Yes, I have.

Q When he arrived to open the shop, was he wearing a firearm?

A No.

Q What did you observe in terms of the opening up procedure and the firearm?

A He unlocked the door, and then he went in and locked the door back after I got in. Then he went over and got his gun, then turned his alarms off, and we got ready to open up.

Q Have you been there on occasion at the end of a workday to [118] give him rides home?

A Yes, I have.

Q Have you ever observed him to carry a firearm from the shop on the way home?

A No, I haven't.

Q You have visited in his home before, is that correct?

A Yes, I have.

Q Have you ever observed a firearm of any kind in his home?

A No.

Q Now, you were in the pawn shop on May the 18th when Mr. Harris was arrested, is that correct?

A Yes, I was.

Q Were you also arrested that day?

A Yes, I was.

Q What were you arrested for?

A Possession with intent to sell and deliver marijuana and Diazepam, and maintaining marijuana and Diazepam.

Q Is that charge still pending in state court?

A Yes, it is.

Q Where was marijuana found that was attributed to you and you were charged with?

A In my car.

Q Was that outside the shop?

A Yes, it was.

Q From whom had you purchased that marijuana that was found in [119] your car on that day?

A Joey Harris.

Q Did you pay him for it when you picked it up from him?

A Yes, I did.

Q So, he did not front it to you?

A No, he didn't.

Q Did he ever – had you ever bought marijuana from him before?

A Yes, I have.

Q Did he ever front the marijuana to you?

A Yes, he did.

Q Sometimes he would front it, sometimes he would not?

A Yeah.

Q Had you ever failed to pay him?

A No, I haven't.

Q Now, on May the 18th, the day you were arrested, where were you and Mr. Harris when he gave you the marijuana and you paid him for it?

A We went to his house.

Q Had you bought marijuana from him at his house before?

A Yes, I had.

Q When you purchased marijuana from him at his home before, have you ever observed him to wear a firearm?

A At his home?

Q Yes.

[120] A No.

Q When you have purchased marijuana from him anywhere, have you ever worn a firearm?

A No.

MR. INGRAM: Thank you. That's all I have.

THE COURT: Mr. Levin?

MR. LEVIN: Briefly, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. McRae, I wasn't sure you paused or not. Has there ever been a time when you observed the defendant selling or buying marijuana when he was wearing a firearm?

A Selling or buying marijuana, when he had a firearm on?

Q Yes.

A No.

Q Well, were you in his shop on April 30th, 1999, when Special Agent Boykin purchased marijuana from Defendant Harris?

A I can't remember if I was there that date or not.

Q Have you ever seen Special Agent Boykin?

A Yes, I have.

Q Where have you seen him?

A In the pawn shop.

Q Do you recall a time when the defendant went behind the pawn shop to sell marijuana?

A No, I didn't.

[121] Q Is there – did you ever loan him the keys to your car?

A Yes, I did.

MR. LEVIN: I have no further questions, Your Honor.

EXAMINATION

BY THE COURT:

Q Is it your testimony that Mr. Harris did not sell marijuana at the shop, as far as you know?

A No, that's not my testimony.

Q Well, is your testimony that he did sell it at his shop?

A Yes, he did.

Q How many times did you see him sell it?

A I don't know. I would say occasionally once a month, bi-weekly, maybe.

Q Who did he sell it to?

A Um, saw Rodney Deaton, his half brother, come in there, and this guy named Garland Pucket come by, and myself, and Agent Boykin.

Q So, you did know that he sold it to Agent Boykin?

A Yeah, after he told me.

Q When he came back in?

A No, I don't recall being there that day. I think I was gone with my girlfriend.

Q When did he tell you that he had sold to Agent Boykin?

A The next day.

Q What did he tell you?

[122] A Well, I mean, that was just something that, I mean, we didn't talk about.

Q You said he did tell you about it. I'm asking you what he said.

A He said agent – well, he didn't say Agent Boykin, but he said that a guy that my brother introduced me to said I sold him – I think an ounce.

Q Are you telling the Court that you didn't see much marijuana sold at that place?

A Maybe bi-weekly and monthly, because most –

Q Why did you hang around there so much?

A Play video games.

Q Pardon?

A Play video games.

Q And anything else?

A Occasionally get high with Mr. Harris.

Q And was that pretty often?

A Probably 50 percent of the time.

Q 50 percent of the time. And you were there everyday?

A Yes.

Q Do you believe your memory is affected by marijuana?

A Short term or long term?

Q Either one.

A I have heard my doctor tell me. I'm not really sure.

Q I'm asking you what you believe.

[123] A I would say maybe a little.

Q How old are you?

A 21.

Q Still using marijuana?

A No, sir.

Q When did you quit?

A The day I got busted, May 18.

Q Haven't used any since then?

A No, I have not.

Q All right.

THE COURT: You may come down.

Mr. Ingram?

MR. INGRAM: Our last witness, Your Honor, is Mr. Patrick Massaroni.

THE COURT: Mr. Massaroni, please come around and be sworn.

PATRICK MASSARONI,
DEFENDANT'S WITNESS, SWORN
DIRECT EXAMINATION

BY MR. INGRAM:

Q State your full name, please.

A Pat Massaroni.

Q Mr. Massaroni, how are you employed?

A I am currently employed as an investigator with the Federal Public Defender's office.

Q Were you assigned to Mr. Harris' case to assist in [124] preparation for trial?

A Yes, sir.

Q In September and October of this year, as part of your investigation did you visit various pawn shops in Albemarle and the Asheboro areas?

A Yes, sir.

Q Let me show you what I have marked as Defendant's Exhibit Number 3. Can you tell Your Honor what that is?

A This is a list of the pawn shops that I visited in September and October of this year.

Q And is this chart I have here next to me at the table an enlargement of that exhibit?

A Yes, sir.

Q For what purpose did you visit each of these pawn shops?

A The purpose is to talk to the people in each one of the pawn shops to see if they were wearing any type of weapons while they were working in the pawn shop, and whether they could be seen or were they concealed.

Q Did you visit each of these pawn shops during daytime working hours on a weekday?

A Yes, sir.

Q And did you meet and talk with either the owner or the employee who was on duty at that time in each pawn shop?

A Yes, sir.

Q Looking at the first one on the list, J.R. Gun Shop in [125] Albemarle, did you meet or talk with the owner or manager that day?

A Yes, sir.

Q Did you observe whether or not that person was wearing a firearm?

A Yes, sir, he was.

Q To cut this a little shorter, did you observe in each of these pawn shops whether or not the person on duty, the manager, employee on duty was wearing a firearm?

A Yes, sir.

Q And were there any of these pawn shops where the person in charge was not wearing a firearm?

A The only one was Top Dollar Jewelry in Albemarle, and he said that –

MR. LEVIN: Objection.

THE WITNESS: – that he had guns –

MR. LEVIN: Objection.

THE WITNESS: Sorry.

THE COURT: I think that is not admissible, but I'm going to allow that in. Go ahead and answer.

THE WITNESS: I'm sorry, Your Honor.

THE COURT: Go ahead. Answer the question.

THE WITNESS: Top Dollar was the only one, and they had weapons close by where they could get hold of.

BY MR. INGRAM:

[126] Q And in how many locations?

A He had them in three locations.

Q And approximately how large was that pawn shop?

A That was a – that's a pretty large pawn shop. It is a little bit larger than this courtroom.

Q Before you were employed as an investigator with the Federal Public Defender's office, how had you been previously employed?

Previously employed with the Greensboro Police Department.

Q For how many years?

A 26 years.

Q During that tenure as a police officer in Greensboro, did you have occasion to visit pawn shops in Greensboro?

A Yes, sir.

Q In your official duties as a police officer, what was your purpose in visiting pawn shops?

A We would go to – Detective Eli Welch, one of the officers/detectives at that time, and myself, would go to different pawn shops to pick up the pawn tickets to examine to see if the property was stolen, and we would check it out. Then occasionally I would also go in to look for merchandise that were stolen on my cases.

Q On those occasions while you were a police officer, when you visited pawn shops in Greensboro did you observe whether or not the owner or person in charge was wearing a firearm?

A Yes, sir.

[127] Q Were they?

A Yes, sir.

Q Did you ever visit in a pawn shop during that time, in one of the pawn shops in Greensboro, when the owner or person in charge was not wearing a firearm?

A At that time, I believe we only had two that I worked, and one of them was on South Elm Street in Greensboro, and the other one was out in the High Point area, and both of them wore guns at that time.

THE COURT: Was the one on South Elm Street B & W?

THE WITNESS: I believe you're right, Your Honor.

THE COURT: Okay.

THE WITNESS: The other one, I don't recall what the name of it was.

BY MR. INGRAM:

Q And in the pawn shops in Greensboro that you visited while as a police officer, and in the ones you visited recently that are listed in Exhibit 3, were some of them wearing firearms that were similar to the firearm in Government's Exhibit 6?

A Yes, sir. Some of them would look like that, and some worse than that.

Q What do you mean by some "worse"?

THE COURT: "Worse," meaning bigger, more dangerous?

THE WITNESS: Larger, more dangerous than what you have got there.

[128] BY MR. INGRAM:

Q Just what kind of weapons were those?

A There was a pawn shop on Spring Garden Street, I can't recall the name of it, that I visited quite often. And we would go in there, and he would have a .357 magnum, and tomorrow a .38, then one day he was carrying a .44. And I told him he needed training wheels for that thing, that was a 10-foot – I don't know, a 10, 12-inch barrel, but he would just wear different types.

Q Typically, what kind of merchandise have you observed for sale in pawn shops?

A All of them had guns that I visited, and you would see TVs, radios; just all types of things you could think of in the pawn shop.

Q Had you been in these pawn shops and observed scales?

A Yes, sir.

Q How frequent was it that you would see scales in a pawn shop?

A Quite frequently. A lot of them would have the digital-type scales. They would have the criminal justice scales which were two – the old cooking scales. You would see a lot of those type of scales in a lot of pawn shops.

Q Thank you.

MR. INGRAM: That's all I have.

THE COURT: Mr. Levin?

[129] MR. LEVIN: Briefly. Thank you, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Massaroni, when you observed the weapons in these pawn shops, J&R Gun Shop, you didn't observe any marijuana, did you?

A No, sir.

Q Did you observe scales?

A Did I observe scales? I believe I saw some in the one in Troy had some scales, but I wasn't there actually looking. I was just glancing around looking at the stuff. I

believe that's where it was, but I'm not positive, Mr. Levin.

Q You were a former police officer?

A Yes, sir.

Q In your experience as a police officer, do you recognize that scales could be used as tools of the drug trade?

A Yes, sir.

Q And they're also used in the pawn shop industry?

A Yes, sir.

Q As a former – when you were a police officer, were you aware that guns could be used as tools of the drug trade?

A Yes, sir.

Q Apparently, guns are also used in the pawn shop business?

A Yes, sir.

MR. LEVIN: I have no further questions, Your Honor.

EXAMINATION

[130] BY THE COURT:

Q Mr. Massaroni, back to the B & W Pawn Shop. Do you recognize the name of Wayne Nixon as being part of the B & W Pawn Shop down on South Elm?

A I believe so, but I'm not positive, Your Honor.

Q Based on any vague recollection or memory, do you recall whether or not Mr. Nixon wore a weapon?

A He didn't, but I believe one of his – is he a little gray-headed guy?

Q No, he is the tall man.

A There is a little gray-headed guy, he didn't wear, but there was another guy that did wear.

THE COURT: I think the record ought to show that at one time I represented B & W Pawn Shop and Wayne Nixon in a lawsuit, and as a result of that I did get to know that those people – though I'm not sure it was Wayne Nixon – in his shop did wear weapons during the time that they were working. If that makes any difference to anybody, I will be glad to hear from you. I am aware of that, outside this case. That's the reason I was asking Mr. Massaroni, to see if we could bring it out that way.

Someone did wear a gun in the shop. All right. Thank you.

MR. INGRAM: Your Honor, that concludes our evidence.

(Witness excused.)

THE COURT: All right. Mr. Levin, do you have any [131] additional evidence?

MR. LEVIN: If I may have a moment, Your Honor. Nothing, Your Honor.

THE COURT: Mr. Ingram, I'm going to hand you a form here. If you and your client would look at it. I

was afraid my memory was playing tricks on me, but it has been found. All right.

Mr. Harris, you're still under oath.

You wish me to sign and approve this jury waiver, is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. I have done it.

Gentlemen, I will hear from you. It occurs that you may wish to be heard.

I think, Mr. Levin, that in the course of things you're required to speak first, so I would say everything you want to in the beginning, because I will decide whether to give you closing on that or not.

MR. LEVIN: Thank you, Your Honor.

THE COURT: All right.

MR. LEVIN: Your Honor, I am used to speaking my mind, so with that said, if I may pull this out.

Your Honor, it is undisputed that on April 30th, in Stanly County, the defendant sold 114 grams of marijuana to Special Agent Boykin.

[132] It is undisputed that during the commission of that drug trafficking offense the defendant carried a fire-arm, specifically the nine millimeter Taurus pistol. That serial number is reflected in the stipulation, which Your Honor has before you.

The only issue coming into court today was whether or not that weapon was used in relation to the drug

trafficking offense; that is, did the weapon have some purpose or effect with respect to the drug trafficking offense. And was its presence more than the result of an accident or coincidence.

Your Honor, we know that in this case the presence of the gun was not sheer happenstance. On the contrary, the defendant admits that he carried the gun to deter would-be robbers from stealing his property. His property, as he defined, was the pawn shop's property, as well as the marijuana.

Your Honor, the mere fact that the defendant was carrying his weapon while protecting his pawn shop property is really of no import. The fact that it served as a dual purpose, the carrying of that weapon, is really not relevant.

The same as the scales, Your Honor. Those scales had two purposes: To weigh jewelry, and to weigh marijuana. The business, the store served a dual purpose: To sell the pawn shop property, and also the defendant sold marijuana from that store.

The weapon served two purposes: To deter would-be [133] robbers from stealing pawn shop property, as well as the marijuana, as well as the cash from the cash register, which contained commingled funds.

The defendant – it might be a closer case, Your Honor, if we were still inside the pawn shop. But on April 30th, the defendant conducted his transaction outside the pawn shop, in a vehicle, in a vehicle which the defendant positioned so that he could see oncoming traffic. He is

wearing his weapon. He still admittedly does not trust Agent Boykin.

So, he left the pawn shop, goes into the vehicle, and he is wearing his weapon, a weapon which increases the likelihood of the success of his drug transaction. And that's all that is required, Your Honor, in order to find in relation to.

Your Honor, the conversation, you heard evidence regarding a conversation about the bullets, the rounds in the weapon being able to penetrate the vest of a police officer. Those comments, Your Honor, set the mood. They send a message.

Number one, he is willing to protect himself against the police. And another inference that can clearly be drawn from that is, if he is willing to use it certainly he is willing to use it against law enforcement, certainly he is willing to use it against criminal elements who might try to steal his marijuana.

Your Honor, clearly the evidence shows beyond a reasonable doubt that defendant carried his firearm during and in relation to the sale of marijuana. Thank you.

[134] THE COURT: Thank you, Mr. Levin.

Mr. Ingram?

MR. INGRAM: Your Honor, the Supreme Court has noted that the in relation to language is there to clarify that a firearm must have some purpose or effect with respect to the drug trafficking crime, and not simply because its presence is the result of accident or coincidence. And specifically, that language was added to allay the concern that a person could be punished under 924(c)

for carrying a firearm when – while in possession of that firearm during a drug trafficking transaction, even though the presence is coincidental or unrelated to the crime.

So, there is a contemplation that – that some set of circumstances exists where a defendant can carry a firearm, during a drug transaction, but the circumstances would illustrate that that was – that the firearm was not carried in relation to.

Obviously, if Congress had wanted to punish simply carrying of a firearm during a drug transaction, they would have left it at that and not put the in relation to language in there.

Mr. Levin states that the scales had two purposes, and therefore the firearm must have had two purposes, also. But the scales are different. The scales, Mr. Harris admits that he used it for both purposes. He weighed gold, he weighed jewelry, [135] he also weighed the marijuana on it. So, he has admitted those have a dual purpose. He has not admitted that the firearm had a dual purpose.

The store, Mr. Levin says, was there for two purposes: It was there to sell his legitimate merchandise, and also to sell marijuana.

Well, that's true. Mr. Harris has admitted that, although he also admitted that he sold marijuana elsewhere. If he had been charged, if we were talking about a charge here, for example, under state law of maintaining a place for the purpose of selling drugs, then certainly his admission that he used – he sold marijuana out of the

store, as well as his legitimate merchandise, would have some relevance. So, the fact that the scales and the store have a dual purpose do not necessarily mean that the firearm also had a dual purpose.

I have tried to come up with some example that I can think of, other than this one, where someone might carry a firearm in relation to a drug trafficking crime, but not be said to have carried that firearm in relation to a drug trafficking crime.

And the two examples I can think of, if a police officer, during his regular business on patrol, carrying a firearm, were to stop by a friend's house and buy or sell some marijuana, then he certainly would be carrying the firearm during the drug transaction. But I think the Court could find under those [136] circumstances that he was not wearing it in relation to the drug crime, because the reason he is wearing it is because he is required to as a police officer.

Perhaps a night watchman who wears a firearm, likewise, might sell some marijuana to some friends who came to the premises, but could be found not to have worn the firearm in relation to the drug crime if he was required to wear it otherwise. And I know it's a fine line to draw. The evidence here is that it's virtually a standard in the pawn shop industry that people wear a firearm for protection in the firearm business.

Just as Mr. Harris testified, it's there for a deterrent. You hope you never have to use it; and that's why you wear it, for a deterrent purpose. He is selling other firearms. He is selling jewelry. He is selling appliances. He has 2 to $4,000 in cash at any one time. And some of the

people who are coming in there to pawn merchandise are very likely criminals, who have very likely stolen that merchandise. That's why, as Mr. Massaroni testified, police officers go and check the pawn tickets, and why they go and check the merchandise periodically, to see if it is stolen.

So, not only the nature of the business itself, by the nature of the merchandise that is there, and the fact that there is a lot of cash on hand, attracts attempted robbers. In fact, acknowledged robbers, if they were to be asked and told the [137] truth, are sometimes coming in there pawning merchandise that they have in fact stolen. So, it's obvious why people in pawn shops do wear firearms. And Mr. Harris testified that his father had been involved in running a pawn shop in the past, and had advised him about the type of security he needed, and that he needed to wear a firearm.

The Government introduced. a photograph made from the videotape where you do not see Mr. Harris wearing a firearm on his hip in a holster like the firearm here that is Government's Exhibit Number 6. But he explained that, that when he first opened his pawn shop business he carried another firearm that he did not have a holster for, and he carried it in the back of his belt.

And we introduced photos that showed his friend in December and January of last year wearing this very firearm, Government's Exhibit Number 6, in the shop. And Mr. Harris explained that the photo of him that appears to illustrate he is not wearing a firearm, that is an inaccurate portrayal. In fact, he had the other firearm in his pants at the time.

And his testimony was that Mr. – the other fellow he knew by the name of Scarecrow, who did have that firearm on him in the photograph, then gave him that firearm for a Christmas present, and he began to wear that in the holster, and that's exactly what Agent Boykin saw when he went in. That's exactly what all of these other people who testified saw every time he [138] was there.

THE COURT: For purposes of any decision in this case, Mr. Ingram, the Court will find that during and in the course of the defendant's business he did, in fact, carry a weapon.

MR. INGRAM: Thank you, Your Honor.

Then I would finally want to make a couple of distinctions to suggest why the Court should conclude that he did not wear this firearm for a dual purpose, given the fact that Your Honor has indicated that he would accept the fact that he wore it at least for protection in the pawn shop business.

Well, one is he sold marijuana other places and did not wear a firearm. By his own testimony, by the testimony of one witness, he bought and sold it at – either bought or sold it at his sister's boyfriend's house, and bought and/or sold it out of his own home. It would seem to me there would be a much greater need for security in a location like those, than there would be in a public, open-for-business pawn shop in the middle of a working day.

But the testimony was that he never had a firearm at home or at the sister's boyfriend's house, and no one

wore a firearm either. Nobody came there wearing a firearm.

Your Honor, I think that's important, especially relevant to the questions Your Honor asked Mr. Harris about if you were wearing a firearm to protect your merchandise in the store, weren't you also wearing it to protect the marijuana? What if, [139] for example, one of your customers refused to pay or took your marijuana?

And, of course, it's Your Honor's decision to interpret and understand in your own way what Mr. Harris was trying to explain. But it seems to me, the distinction he was trying to make when he answered Your Honor, that the reason I would not have used the firearm if one of my customers had refused to pay is because they were my friends.

And then, Your Honor would ask why would you not use it, because they were your friends? And I think the answer he was giving was because they were my friends. I would not have used a firearm around my friends. These were not – I think there is a danger that this could be viewed in the – viewed in the abstract as some sort of drug operation where people are buying and selling drugs in the most nefarious kind of stereotypical way that the public views drug transactions.

What we have here is a guy who had three or four friends, half brother. He would buy some marijuana, and essentially buy for them also. They would then come by and buy from him or pay him, or he would front to them and they would get their share of it.

It was a group of friends that bought and sold marijuana together. And, as Mr. McRae said, probably got high together. This was not a clandestine crack house or a street gang where everybody comes armed to the teeth because there may very well [140] be violence, or there may be tens of thousands, if not hundreds of thousands of dollars passing hands there, and kilos of crack or heroin or cocaine passing hands.

This was – without minimizing the significance of the marijuana problem in this country, this was just marijuana. This was a drug that came about as close to – we have had since Prohibition, to having any drug legalized back in the '70s.

This simply was not a cocaine, crack, heroin-type situation. These were people who were buying and selling marijuana in amounts where $360 passed hands, not $25,000 or a hundred thousand dollars.

I think his answer to Your Honor's question, about why would you not have used your firearm if some of your customers had not paid you, was exactly what he meant to say, that is, because they were my friends.

I think the Government certainly has proved that Mr. Harris has admitted that he carried that firearm during the drug transaction. He hasn't denied any fact here that the Government has put into evidence. He simply denies the inference that he wore that firearm because – even partly because he sold some marijuana out of his shop, as well as selling marijuana other places. People came and picked it up in other places.

THE COURT: Tell me, Mr. Ingram, what you make of the statement that he makes when he talks about having that gun, this gun and the bullets that we have made here makes it capable [141] for the bullet to penetrate not only the bulletproof vest, but penetrate the heart of a policeman? To which he responds during trial, I don't know why I said that.

What do you make of that, if anything?

MR. INGRAM: I don't make much of it. But I want to characterize it the way I think it should be characterized, and the way the discussion actually took place, and that is, admittedly, the tape we heard here today was a little bit clearer than the copy of the tape that I had heard.

THE COURT: I see.

MR. INGRAM: I still did not hear, and maybe Your Honor did, I still did not hear anything about penetrating the heart, penetrating the body armor. I did hear him say this could F-up a cop.

THE COURT: I thought I heard something about penetrating the bulletproof vest. But I, too, did not really catch from that. But there has been, of course, no denial that that happened, because Mr. Boykin was really not cross examined, nor was there a contradictory evidence put. He said I said it, at least Mr. Harris did.

MR. INGRAM: Your Honor, had he only said referring to this ammunition, this could F-up a cop, I think the clear implication could mean a cop standing there without armor is no different than a fireman standing there without armor, or a lawyer standing there without armor. I think the clear [142] indication would be this is powerful enough to penetrate body armor.

So, I think –

THE COURT: I have a hard time with that one. My own thought processes run a little differently from that, in that if the gun was to protect him in case of violence from the mean group of people who pawn things, he would have at least said in the vernacular of this will stop anybody who steals money from me or tries to rough me up when I am here in this pawn shop.

MR. INGRAM: Your Honor, they are talking about firearms. As far as Mr. Harris knows, these are guys who are talking about – there is a Baretta mentioned. He said no, this is a Taurus. He has firearms there. And I think, fairly, that conversation should be characterized as sort of macho talk about firearms.

Hey, I have got ammunition in here that could – even how powerful is it. Well, they're homemade bullets, and they can penetrate body armor. That's all that was.

THE COURT: I just thought it was sort of significant. I can understand the argument that you're making that your client said, and this goes to his credibility. I don't know why I said that.

MR. INGRAM: And I think he is being honest. He's there. I mean, there is no reason for – I would have a hard time coming up with a reason. I don't know why I said that. I was [143] bragging; I was boasting about the power of the ammunition, is the only reason you could say.

There is no real reason why he said that. I think it would be an erroneous conclusion to conclude that by that he meant if ever a cop comes in while I am selling marijuana, I can kill a cop.

THE COURT: May be, but that's what he said, that this will penetrate a cop's armor and go through his heart. And in conjunction with the situation that was going on at that time, that is an illegal transaction. It makes it difficult for me to convert that to a legal transaction.

MR. INGRAM: Well, Your Honor has already indicated that you accept the fact that he was wearing the firearm at least in part for protection.

THE COURT: I do. I certainly do.

MR. INGRAM: I think in recalling the context in which that one comment was made, that is a 45-minute tape, and much of that was conversation about something other than the drug transaction.

THE COURT: I assume that's correct –

MR. INGRAM: Then I think that it is just as fair a characterization to say this was boasting about the power – I don't know what else. I don't know about guns, so I don't know what else you could compare the power

of a particular type of gun or ammunition. This could go through a six-inch piece of [144] wood, but it seems to me that whether or not a particular type of ammunition can penetrate body armor is the – in the lingo of the guys who like guns and talk about guns, that would be a way to explain or to boast about the power of the ammunition.

THE COURT: That may be. When you add through an officer's heart, that adds a new dimension to it that is not present before, whatever you make of it. I understand.

MR. INGRAM: Your Honor, I would suggest that the totality of the evidence here about the pawn shop operation, the photos that you see, the fact that his friends hang out there, the fact that police officers are regularly in there to check for the various reason Mr. Massaroni testified that he went to pawn shops as a police officer, to pick up the pawn tickets.., to check those against recent thefts, and to check the merchandise against known stolen merchandise, the fact he has police officers coming and going on a regular basis, knowing them on a first-name basis, I think suggests that the characterization I'm giving of that conversation is a fairer characterization of that.

THE COURT: Let me ask you a speculative question, Mr. Ingram. Suppose the evidence in this case is exactly like it is, except that when things started out this was a 100 percent pawn shop operation. But at the time on April the 30th, 1999, it turns out from valid evidence that the operation is 25 percent pawn and 75 percent marijuana. Does your argument still [145] stand that because this was a pawn shop operation, and people do

carry guns in the operation of that, that even though drug transactions thereafter were going on, it is not in relation to those drug transactions that the gun was carried?

Would that be a fair argument?

MR. INGRAM: Your Honor, I think there are several factual variables there.

THE COURT: Okay.

MR. INGRAM: One, if the evidence shows that it was a 25 percent pawn shop operation, 75 percent drug operation, and the drugs that were being sold were 100 grams or so at a time for $360, then I think it may not be a fair characterization to say that the firearm carried was in relation to a drug transaction.

THE COURT: Then do we look at it on the basis of profits as opposed to time involved?

MR. INGRAM: Let me give you one other factual –

THE COURT: All right.

MR. INGRAM: I think the – if the evidence shows that the pawn shop was purely a front, that he stuck some TVs and firearms in there and a cash register, but really all he did was sell marijuana there, then I think certainly that is the extreme example.

THE COURT: We both agree on that. I bet Mr. Levin would agree on that, too. But when you back off from that, where do you stop? If its 25 percent legitimate, 75 percent [146] illegitimate, if it's five percent legitimate and 25 percent illegitimate, what's the line that we draw on wearing and in relation to a drug offense?

MR. INGRAM: I'm not sure where you would draw an automatic line, but I don't think that's the only thing that the Court should consider. I think the Court should consider first of all, as the Court has, that pawn shop owners carry firearms for protection purposes.

THE COURT: Right.

MR. INGRAM: Secondly, I think the Court should consider the evidence, and there is nothing here that the Government has presented to the contrary, that Mr. Harris earned a living out of this pawn shop. And he made no money off of the marijuana, except to pay for his own use. He basically sold enough to pay for his own. And so, he was not making a big profit out of the marijuana business. So, I think the example in terms of the profit motive or the profit relationship in this case is really at the other end of the spectrum from the front.

THE COURT: Could be. I don't really have any evidence of that before me, do I? I don't have any idea what he was making out of his pawn shop.

MR. INGRAM: Except his testimony that he was earning a living by doing it, and he was not making any money off the marijuana except to pay for what he used for himself.

THE COURT: Okay.

[147] MR. INGRAM: That, to me, is a hundred percent versus a zero percent. I think, in addition to that, I think Your Honor should consider that this was marijuana, and this was marijuana being sold to his friends and to people that his brother brought to him. A relatively small group of four friends. And I think by the time

we add in Agent Boykin, there were maybe three others, maybe including Agent Boykin, that his brother brought to him and said they want to buy a little bit. When I say a little bit, that is pretty much what Mr. – Agent Boykin was buying, 114 grams, $360. This much, as you saw in the exhibit.

I think the type of drug, compared to heroin, cocaine, crack, and the relative small amount of the drug that was sold, and the nature of the group that was involved, that is, virtually his friends and acquaintances of his family, and a relatively small number at that, all suggest that this was not a drug – a stereotypical drug operation that required the use of a firearm for protection.

I know that there are some people, probably some courts, that would say if you sell any kind of drug, any time, and there is a firearm there, then there must have been some potential for its use.

Well, if you can leap to that conclusion in every case, then we might as well take out the in relation to element of the crime, because if it's possessed or carried during, that's all that would be required, if you assume that a firearm being [148] present could always further the likelihood of success of the crime.

I think, obviously, there is the Supreme Court, and in my request for jury instructions, back when we were thinking of a jury trial, I cited the Supreme Court case and two Fourth Circuit cases that acknowledged there must be some circumstances where the presence of a firearm is either a coincidence and is unrelated to the drug transaction, even though it is there. I submit that this is one of those cases. And I think it was just a

coincidence. He was wearing it for his protection. There is no indication he would ever need to use it for protection of the marijuana business.

He testifies, believably, he would never have used it in that context because he was dealing with his friends and people who were introduced to him by his brother. I think if there is ever a circumstance where the firearm's presence is a coincidence, then I think short of the example I give about a police officer or security guard, that this is equally as compelling for the Court to draw that conclusion.

THE COURT: Actually, Mr. Ingram, I am sort of convinced that the example that you gave may still be a factual dispute as to whether that case was used during and in relation to a drug trafficking offense.

I guess I have would have to take it one step further. It is not my business to give examples of what isn't a [149] violation, but I would assume that if an officer were walking along the street fully armed, and looked down and found a package which was marijuana, and he goes home and puts it in the mail to his brother in California, and says send me $1,000 for this, I would assume that his weapon would not have been used in connection with and in relation to a drug trafficking offense.

But if he walks up to a door with his gun showing, and says you sell me marijuana, then I think there might be a factual basis to say it was during and in relation to the drug purchasing offense.

MR. INGRAM: I agree with Your Honor on those facts. Where I would draw a distinction with the

police officer, and would liken it to this situation, if a police officer on his routine patrol wearing his firearm stops and goes up to a crack house where crack is being sold 24 hours a day, and goes in, doesn't know these people except as drug dealers, that's the only relationship he has to them, they have weapons there, also, he buys a quantity of crack cocaine. I think in those circumstances it would be difficult to argue the firearm did not have a dual purpose.

But if that police officer has known a guy for seven years, and hangs out with him, and knows him well, that's his friend, and he stops by that guy's house, and goes up and knocks on the door and says, do you have my marijuana that you're going to buy for me? And the guy says, yeah, I picked it up this [150] afternoon, here it is. You have got the money, here it is. I would say that's not in relation to.

I think that's exactly what we have here: People dealing with friends over marijuana on a regular basis, where there was no anticipation of any need for any firearm. Importantly, Mr. McRae testified that he never carried a firearm when he bought from him.

THE COURT: Unfortunately, I think Mr. McRae really enjoys marijuana.

MR. INGRAM: I think that was true.

THE COURT: That's his business.

MR. INGRAM: And this is sort of beside the point and not in evidence: I think his testimony that he has not been using marijuana is probably because he has got a pending charge and is having to be tested.

THE COURT: It's just sad to see something like that, it really is. All right.

MR. INGRAM: I may have beat my horse to death by now. And so, unless Your Honor has any other questions, I think I have made the points I feel I need to make.

THE COURT: Thank you, Mr. Ingram.

Gentlemen, I think the facts are pretty clear. It is the inferences to be drawn from the facts. And I really don't have any problem finding in my own mind that from this evidence, and from life in general, that pawn shop operators probably are [151] going to carry about their person some type of weapons. I have seen it in pawn shops. And my guess is, there are times I didn't see it that it was there.

But from this evidence, I don't have any problem finding that Mr. Harris ordinarily carried, and generally and specifically carried a firearm during the course of his pawn shop operation.

The problem I have with Mr. Harris' position is that this was not singularly a pawn shop operation. It is a sale of an illegal drug that took place, and Mr. Harris himself says that his gun was to protect his property, and it was for show. He didn't use that word, but essentially that was what he used when he said he hoped it would make people think before trying anything.

And I simply am unable to draw the distinction that if it is for a legitimate purpose, it cannot be for an illegitimate purpose. I think there are cases in which that might be argued, but in my opinion the facts of this case

show that this man was willing to sell marijuana. He did sell marijuana at his place of business, in and outside the place of business.

He had a gun. He had it for show, and it was a comfort to him, whether he was engaged in legitimate or illegitimate business at any time; and therefore, I don't have any problems finding from this evidence that Mr. Harris carried a firearm on April the 30th, 1999, during and in relation to a drug [152] trafficking offense. Therefore, on Count 2, the Court would find that Mr. Harris is guilty as charged in Count 2.

Now, sentencing in this case will take place – by the way, I need now to go back to Count 1.

There is a stipulation that he was selling, or did sell the marijuana, but is there any reason we can't use that stipulation or agreement on the basis for a plea on Count 1, Mr. Ingram?

MR. INGRAM: No, Your Honor.

THE COURT: The Court finds that upon agreement of the parties to the facts that have been introduced in this case, that Mr. Harris, by his own admission, is guilty of the charges contained in Count 1. The Court has heard the facts, and finds there is a basis in fact for the acceptance of the plea to Count 1, and therefore Mr. Harris is guilty as charged in Count 1. And the Court's finding in lieu of the jury verdict, a finding of guilty on Count 2, the Court finds the verdict of guilty there.

In this case, sentencing will take place on February the 1st, 2,000 [sic], 9:30 a.m., in Greensboro, in Courtroom Number 1.

Now, Mr. Ingram, what say you to custody?

MR. INGRAM: Your Honor, under the bond statute, this is not a case that whereupon a finding of guilt the Court must take Mr. Harris into custody, because this is a maximum five-year penalty, and the statute says that if there is a conviction of a [153] drug offense carrying a maximum ten-year sentence or more, the Court must take the defendant into custody.

He has been out on bond from the inception in this case. And I checked yesterday with Elaine Rector in Pre-Trial Services, who is his Pre-Trial Services officer here, although he has been directly supervised by a Pre-Trial Services officer in Charlotte because of the proximity of his residence to the Charlotte area. I inquired of her to see if there had been any problem with his pretrial release. She said she did not know of any, but I took the opportunity to call Charlotte, and called me back, and indicated that no, there had been no problem with his pretrial release to date, and he has reported as he is required.

He has done everything that has been required of him, including taking urinalysis testing, which has proved negative. He has reported every time that he is supposed to be in court, and every time that he is supposed to meet with me.

So, I don't think there is any question that he will appear as ordered for sentencing. He will cooperate with the probation office in meeting with them to prepare a presentence report, and he will be no danger to the community. He has not used marijuana since his arrest, has not sold marijuana, has nothing to do with it now. He is working in the landscaping business now, temporarily.

THE COURT: The place is closed?

MR. INGRAM: Yes, sir.

[154] THE COURT: Okay. Is he hanging out with any of these people like Mr. McRae?

MR. INGRAM: I know they have come with him to meet with me. I can't say that? If Your Honor –

THE COURT: It seems to me like those people ought to be separated. First let me hear what Mr. Levin has to say, Mr. Ingram.

MR. LEVIN: Your Honor, the Government's position is that the defendant should go to jail today. He is facing a significant amount of time.

THE COURT: Is it because you think he is required to do that, or is it discretionary with the Court?

MR. LEVIN: Actually, Your Honor, I did not look into it.

THE COURT: I think if it is a crime of more than ten years it is mandatory. If you want to check on that, I will certainly give you time to do it. But it is my belief that it is not a mandatory matter for the Court, it is discretionary. We can look at it and see, if you want to.

MR. INGRAM: I can show you that.

MR. LEVIN: I understand the Court has discretion in this matter. The Government's position is the same, for the reasons that he is still facing a significant amount of time, and it is an offense involving a firearm.

THE COURT: Do you have any knowledge or speculation or information that he is likely to flee or is

likely to cause a [155] danger to anyone in the community, Mr. Levin?

MR. LEVIN: If I may have a moment, Your Honor.

THE COURT: Yes, sir, you may.

MR. LEVIN: Your Honor, I just bring to the Court's attention, apparently threats have been made against the defendant's half brother relating to this case. I cannot – I'm not in a position to identify who made those threats.

THE COURT: All right.

MR. LEVIN: That's all we have, Your Honor.

THE COURT: Thank you, Mr. Levin.

Mr. Ingram, have your client stand, please.

Mr. Harris, I hope you can understand the seriousness of the matter here, and I expect you do. But this is a matter in which the Court has complete discretion whether you go home or don't go home today. And it's a real debate as to what to do here.

It appears that there have been some threats made to your half brother, against whom I assume that you hold some rather hard feelings. And it would be hard to convince me that you don't hold hard feelings against someone who had inadvertently or intentionally set you up.

Therefore, when these rumors circulate and fly, naturally the one that it must come down to and point towards, whether accurately or inaccurately, is you. So,

you have to bear the brunt of that, whether you have anything to do with it or not.

[156] You have, according to Mr. Ingram, met every meeting that you were supposed to have with him. You have been here and you have tried to be here on time. And by the way, this morning's events of not being here on time are not being held against you at all. It is my understanding, and I appreciate the candor of Mr. Ingram in telling the Court that he misdirected you on where to be here today, and so the Court is finding no fault on your part at all now.

But both of these are serious matters. My guess is that you and Mr. McRae and a few others probably think that marijuana is such a mild thing that you don't understand why people get upset about it. My only response to that is that I don't think you understand the gravity of the situation if you feel that way; and secondly, it is still a violation of the law, and you have no right to pick and choose what laws that you will obey.

If you get caught disobeying the law, then you're going to have to suffer the consequences, which are not light, even at best. All of which is to say that this Court considers the matter close, a close call, but is going to allow you to remain at liberty, assuming that the rumors of threats to anyone, including a brother-in-law, arising out of this matter, cease and desist.

You may ask how you can have any part in that in making them cease and desist if you are not having any part in doing them already. And my only response to that, that's your burden, [157] not the Court's, because

you're in the position that the guilt or apparent guilt falls on you and no one else.

So, you may be subject to be brought in at any time and your bond revoked, even on something that you don't do, unless these rumors stop about the brother-in-law.

Outside of that, the Court is going to allow you to remain at liberty. I am concerned about the people with whom you have consorted in the past, because I think at least one or more of them are friends in marijuana, and probably friends in what you think is fun and enjoyable, but you're going to have to cease and desist while you're at liberty. You probably already have, because your urinalysis testing has shown negative to this point.

I'm going to ask Mr. Levin to talk with probation about it, make sure that probation does, in fact, continue with great care and concern the testing, random testing, so that you may prove to us that you're doing all right.

And, Mr. Levin, if you have any problems with that and probation, you let me know and I will make it further a specific order of this matter.

Now, with that admonition, Mr. Harris, if you're willing to be bound by the same terms that you were originally, and in addition to that, that you stay away from this crowd that stayed at your place, and engaged in the marijuana business, or smoking and using, I am going to let you remain at liberty until you are [158] called for your designation, or until the Court hears further information rendering the serious matter breach here.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Are you willing to accept those consequences and conditions?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

In that event, the Court will find that Mr. Harris at this point does not pose a danger to the community, nor does he pose a risk of flight. And under Title 18, 3143, the Court finds that he should and can remain at liberty, subject to the same terms and conditions which the Court has imposed here today.

You will report directly to the institution to which you're assigned.

It is my duty now to require, Mr. Harris, that you cooperate fully with the probation office in the preparation of the presentence report. You may talk to Mr. Ingram about what you should say to the probation office in connection with the offense with which you're charged here. And if you elect not to talk about it, because you pled not guilty before the Court, that will not be held against you. But in all other respects, it is my duty to require that you cooperate fully with the probation office, and so that all things necessary for the Court [159] to consider can be brought to the Court at the time of sentencing.

You will cooperate?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. Where do you live, Mr. Harris?

THE DEFENDANT: In Ansonville.

THE COURT: I understand that. Under what conditions? What are your living conditions? Who are you living with?

THE DEFENDANT: I live with my girlfriend right back there. I rent a house from that lady over there, Cathy. Back behind her house. It's just me and her, that's it.

THE COURT: How long have you been living with this girlfriend?

THE DEFENDANT: About a year now.

THE COURT: So you are just living, no plans to marry, just having a good time?

THE DEFENDANT: Yeah, I probably will marry her.

THE COURT: Probably will? You haven't asked her yet, just having a good time?

The Court doesn't really take a great interest in that. It's not particularly interested in you doing that, but I'm not going to impose my personal wishes at this point. I don't find that to be a necessarily good situation. All right.

Anything else, Mr. Ingram?

[160] MR. INGRAM: No, Your Honor.

THE COURT: Mr. Levin?

MR. LEVIN: No, Your Honor.

THE COURT: All right. Thank you both. Thank you for your presentation.

(Court concluded.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	
	:	
v.	:	1:99CR191-1
WILLIAM JOSEPH HARRIS	:	

POSITION OF THE UNITED STATES WITH RESPECT TO SENTENCING FACTORS

NOW COMES the United States of America, by and through Walter C. Holton, Jr., United States Attorney for the Middle District of North Carolina, pursuant to Standing Order Number 20 of the Implementation of Sentencing Procedures Under the Sentencing Reform Act of 1984, and files its Position of the United States With Respect to Sentencing Factors.

PROCEDURAL HISTORY

On August 31, 1999, Defendant Harris was charged in a four-count indictment. On October 26, 1999, Defendant Harris pled guilty to Count 1, alleging that on April 30, 1999, the Defendant distributed 114 grams of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(D). Contrary to his plea, the Defendant was convicted of Count 2, which alleged that on April 30, 1999, the Defendant in furtherance of a drug trafficking crime, that is, distribution of marijuana, possessed a Taurus 9mm pistol, in violation of 18 U.S.C. § 924(c)(1). The Government dismissed Counts 3 and 4 of the indictment.

Thereafter, the Probation office prepared a Presentence Report (the "PSR") in which it computed Defendant's offense level and determined the Court's sentencing options.

Defendant's counsel thereafter filed an objection to the PSR asserting that Defendant should receive credit for acceptance Of responsibility. Government's counsel filed an objection to the PSR asserting that Defendant testified that he had purchased between 8 to 12 pounds of marijuana since 1992. Thus, his base offense level should be 12 with a guideline range of 10 to 16 months. The Government further objects in this position paper to The sentencing options set forth under paragraph 41 in the PSR. Specifically, for Count 2, because the Defendant brandished the firearm, the term of imprisonment is not less than 7 years, rather than the 5 years set out in the PSR.

Based Upon the Amount of Drugs Defendant Admitted to Purchasing, The Base Offense Level Should be 12.

Defendant Harris testified at his trial that he had been selling drugs for six years. (J.A. 86). He identified those individuals from whom he had been purchasing the drugs for resale. (J.A. 88-89). He estimated the total amount of drugs he had purchased from these individuals over the six-year period he had been selling drugs to be between 8 to 12 pounds of marijuana. (J.A. 90). Finally, he identified the individuals to whom he had been selling the drugs. (J.A. 91-93).

The Defendant's testimony concerning his drug distribution activities is corroborated by the fact that he was

observed selling marijuana from his pawn shop on several occasions.

The Defendant's own estimate, while self-serving, is the best evidence thus far to determine the appropriate relevant conduct.

The Defendant might argue that the distribution of 8 to 12 pounds of marijuana, even if an accurate estimate, should not be considered "relevant conduct." Once it is determined that the charged and uncharged offenses should be grouped together under U.S.S.G. § 3D1.2(d), this court must determine that the offenses are "part of the same course of conduct or common scheme or plan as the offense of conviction" in order to consider the uncharged offenses as relevant conduct. *See* U.S.S.G. § 1B1.3(a)(2); *see also United States v. Mullins*, 971 F.2d 1138, 1143 (4th Cir. 1992). Commentary to U.S.S.G. § 1B1.3 explains that "[f]or two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victim, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. § 1B1.3, comment. (n.9). Further, "[o]ffenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id.* Factors to be considered include similarity, regularity and temporal proximity between the offense of conviction and the uncharged conduct. *Mullins*, 971 F.2d at 1143 (citing *United States v. Hahn*, 960 F.2d 903 (9th Cir. 1992), *cert. denied*, 510 U.S. 949 (1993)). The absence of a factor does

not bar the consideration of the uncharged conduct as relevant conduct; rather, "a district court should 'look for a stronger presence' of at least one of the components if one of the components is not present at all." *Id.*

This court should consider all of the drugs associated with the uncharged conduct as relevant conduct under both the common scheme or plan and the same course of conduct analyses. First, the uncharged conduct and the offense of conviction shared a common purpose and a similar *modus operandi*. The common purpose was to gain financially through the sale of the drugs. The Defendant specifically admitted that his intent was to obtain drugs at no cost and therefore gain financially. (J.A. 94). The similar *modus operandi* was that, since 1996, he sold the drugs out of his pawn shop and would use the proceeds to pay his supplier and purchase more drugs. (J.A. 91, 100). Apparently, he possessed a firearm during many of the sales.

Accordingly, Defendant's multiple sales committed over a six-year period were part of a common scheme or plan within the meaning of U.S.S.G. § 1B1.3(a)(2). As such, all of the drugs associated with the sales should be considered in the calculation.

Because the Defendant "Brandished" a Firearm Within the Meaning of 18 U.S.C. § 924(c)(4), the Court Should Sentence Him to Seven Years under 18 U.S.C. § 924(c)(1)(A)(ii) as to Count Two.

The second count of the indictment against the Defendant charged him with violating 18 U.S.C. § 924(c)(1)(A). The Defendant was adjudged guilty of said count following a bench trial.

For offenses committed on or after November 13, 1998, such as the one at issue in this case, subparagraph 924(c)(1)(A) provides as follows:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall in addition to the punishment provided for such crime of violence or drug trafficking crime
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) *if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;* and
>
> (iii) if the firearm is discharged be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A) (emphasis added).

As of the same effective date, paragraph 924(c)(4) declares that:

> For purposes of this subsection [924(c)], the term "brandish" means, with respect to a firearm, to display all or part of the firearm, *or otherwise make the presence of the firearm known to another person, in order to intimidate that person,*

regardless of whether the firearm is directly visible to that person.

18 U.S.C. § 924(c)(4) (emphasis added).

The facts set forth in the PSR confirm that in this case the Defendant "otherwise ma[d]e the presence of the firearm known to another person in order to intimidate that person. . . . " *See* PSR at ¶ 5. Accordingly, "regardless of whether the firearm [wa]s directly visible to that person," the Defendant "brandished" a firearm under 18 U.S.C. § 924(c)(4). As a result, the PSR should prescribe a seven-year mandatory minimum sentence as to the firearm count in this case. *See* 18 U.S.C. § 924(c)(1)(A)(ii) (stating that "if the firearm is brandished, [defendant shall] be sentenced to a term of imprisonment of not less than 7 years").

Despite the fact that the Defendant "brandished" a firearm within the meaning of 18 U.S.C. § 924(c)(4), he may contend that the Court may not impose the sentence provided by law for such conduct because his indictment did not contain the word "brandish." In making this argument, the Defendant may rely upon *Jones v. United States*, 119 S.Ct. 1215 (1999), wherein the Supreme Court held that provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing markedly higher penalties when "serious bodily injury" or "death" results, create separate offense elements requiring proof beyond a reasonable doubt. For numerous reasons, however, *Jones* does not support the claim that the absence of the word "brandish" from the instant indictment precludes this Court's imposition of the otherwise clearly applicable

seven-year mandatory minimum sentence from 18 U.S.C. § 924(c)(1)(A)(ii).

The *Jones* Court focused on unique aspects of the carjacking statute's structure and legislative history in determining that "serious bodily injury" and "death" constituted elements of distinct carjacking offenses, rather than sentencing factors for one basic carjacking crime. Most notably, the Supreme Court cited the fact that congress based the carjacking law upon two other federal robbery statutes that explicitly made "serious bodily harm" and/or "death" offense elements, just as countless state crimes did. *See id.* at 1219-21.

The statutory provision at issue here does not suffer from the structural or enactment-related quirks that led to the *Jones* decision. As an initial matter, unlike the phrases in *Jones*, the term "brandishing" has no pedigree as an element of analogous federal or state statutes, but rather comes from the Sentencing Guidelines, where obviously it serves as a sentencing factor for courts to resolve, not an offense element for juries to find. *See* U.S.S.G. § 2B3.1(b)(2) (providing that "if a firearm was brandished . . . increase [robbery offense level] by 5 levels").

The legislative record leading to the November 13, 1998, reform of 18 U.S.C. § 924(c) further confirms that Congress intended "brandishing" to serve as a consideration for sentencing, not an element of a new crime. Prior to the amendment in question, paragraph 924(c)(1) stood as a discrete offense, with alternative *actus reus* elements of "using" or "carrying" a firearm. In *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court narrowed

the widely-accepted definition of "using" a firearm, thereby sparking a congressional response.

Initial versions of the bill that eventually became law on November 13, 1998, struck out "using" and "carrying" as the physical act elements of subsection 924(c) and replaced them with new *actus reus* elements of "possessing," "brandishing," and "discharging." *See, e.g.*, 142 Cong. Rec. H2674-01, H2685-H2686 (Mar. 22, 1996) (setting out section of bill entitled "Mandatory Prison Terms for Possessing, Brandishing, or Discharging a Firearm or Destructive Device during a Federal Crime that is a Crime of Violence or a Drug Trafficking Crime"). Under that proposal, "brandishing" clearly would have become an element of a distinct offense. The reform ultimately adopted by Congress, however, did not follow that course.

Instead, the November 13, 1998, amendment retained the physical act elements of "using" and "carrying," and added only one new *actus reus*, "possessing a firearm in furtherance of the crime." *See* 18 U.S.C. § 924(c)(1)(A). Rather than including "brandishing" and "discharging" as additional disjunctive physical act elements, Congress placed those terms in separate penalty provisions. *See id.* Accordingly, in this case, unlike *Jones*, statutory structure and legislative history support the treatment of "brandishing" as a sentencing factor, not as the key element of a new offense.

In addition, both before and after the Supreme Court's ruling in *Jones*, courts have held that other provisions of paragraph 924(c)(1) that raise the applicable statutory penalty based on the type of firearm involved,

see 18 U.S.C. § 924(c)(1)(B), represent sentencing factors, not offense elements. *See, e.g., United States v. Eads*, 191 F.3d 1206, (10th Cir. 1999) ("[W]e agree with the Fifth Circuit that the type of firearm used or carried is a sentencing enhancement rather than an element of the offense, and that this is not in conflict with the Supreme Court's decision in *Jones*."); *United States v. Castillos*, 179 F.3d 321, 328 (5th Cir. 1999) (concluding that decision in *Jones* turned on ambiguous structure and legislative history of carjacking statute and, therefore, "declin[ing] to reconsider [Fifth Circuit's] prior decision that the type of firearm used or carried is a sentencing enhancement, and not an element of the offense"); *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1272 (11th Cir. 1998) (holding that "type of firearm involved in a § 924(c) offense is not an element of the offense and is thus not a question for the jury; instead it is a sentencing question to be resolved by the sentencing court by a preponderance of the evidence"), *cert. denied*, 119 S. Ct. 1809 (1999); *United States v. Shea*, 150 F.3d 44, 51 (1st Cir.) (ruling that "assault weapon provision is not an element of the § 924(c)(1) offense, but instead, a sentencing enhancement"), *cert. denied*,[1] 119 S.Ct. 568 (1998).

The Fourth Circuit adopted the same approach in an unpublished decision. *See United States v. Cooper*, 953 F.2d 640, 1992 WL 14592, **2 (4th Cir. Jan. 30, 1992) (affirming district court's imposition of 30-year, rather than five-year sentence, based on type of firearm, despite defendant's claim that "jury rather than the court should have

---

[1] Only the Ninth Circuit has taken the contrary view. *See United States v. Alerta*, 96 F.3d 1230, 1235 (9th Cir. 1996).

made the determination of whether he used a machine gun"), (copy attached) *cert. denied*, 118 S.Ct. 1570 (1998).

Under 18 U.S.C. § 924(c)(1), matters regarding the degree of firearm involvement (*i.e.*, "brandishing" or "discharging") and issues related to the type of firearm involved (*i.e.*, "machine gun" or "semiautomatic assault weapon") both lead to enhanced sentences and are set out separately from the offense elements. In this context, no rational theory of statutory construction can support the simultaneous treatment of the former category of enhancements as offense elements and the latter one as sentencing factors. This Court thus should embrace the persuasive authority counseling that all these matters constitute considerations for courts at sentencing, not juries at trial.

In two recent cases before this Honorable Court, per Judge Bullock, this Court ruled that "brandishing" in a 924(c) context is a sentencing factor. *United States v. Whitt* (1:99CR29-1) (transcript attached, 23-25); *United States v. Jackson*, (1:99CR8-1). Recognition of the penalty enhancements within 18 U.S.C. § 924(c)(1) as sentencing factors (rather than as offense elements) not only follows precedent and logic, but also promotes sound judicial policy. The contrary approach would cause undue confusion and complication of the trial process. For example, treatment of these matters as offense elements would create complex issues regarding lesser-included crimes and would necessitate intricate special verdicts, trends likely to burden courts and to impair the judgment-rendering capacity of juries faced with the requirement of unanimity.

In light of all these considerations, the Court should impose the seven-year mandatory minimum sentence enacted by Congress to punish "brandishing" of firearms during federal drug crimes, the very behavior in which the Defendant engaged.

This the 12th day of January, 2000.

Respectfully submitted,

WALTER C. HOLTON, JR.
United States Attorney

/s/ Steven H. Levin
STEVEN H. LEVIN
Assistant United States Attorney
NCSB #19135

P. O. Box 1858
Greensboro, NC 27402

336/333-5351

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing position was served upon the persons hereinafter named, either personally or by placing the same in the United States Mail, this the 12th day of January, 2000, addressed as follows:

Addressees: Bob Wright
United States Probation Office

William C. Ingram, Esquire
101 South Elm Street, Suite 210
Greensboro, NC 27401

/s/ Penny Simmmons
PENNY SIMMONS
Paralegal Assistant
United States
Attorney's Office

P. O. Box 1858
Greensboro, NC 27402
336/333-5351

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

[Caption Omitted In Printing]

* * *

[86] anything that would prohibit them from doing that?

Let's take a break until 20 minutes to 2:00.

(Recess taken from 12:25 p.m. until 1:40 p.m.)

THE COURT: Mr. Harris, if you would, come back to the stand, please, sir.

Mr. Harris, you're still under oath from this morning.

Mr. Levin.

MR. LEVIN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. LEVIN:

Q Mr. Harris, you've owned a pawn shop since November '96, is that right?

A Yes, sir.

Q And you have had two pawn shops total?

A Yes, sir.

Q And how long have you been selling drugs?

MR. INGRAM: Objection.

THE COURT: Overruled.

THE DEFENDANT: I guess since I was about 16.

BY MR. LEVIN:

Q How old are you now?

A 22.

Q You started selling marijuana since you were 16?

A Yes, sir.

Q Where do you get the marijuana?

* * *

[88] this picture has been taken?

A Looks like – it looks like the corner of my sister's bedroom. That's the fish tank right there.

Q Do you see'a rifle in that picture?

A Yeah.

Q Is it hanging on the wall?

A No.

MR. LEVIN: If I can retrieve the exhibit.

I would like to move this into evidence, Your Honor, as Government's Exhibit Number 8.

THE COURT: Any objection, Mr. Ingram?

MR. INGRAM: No, Your Honor.

THE COURT: It's admitted.

BY MR. LEVIN:

Q How long have you been buying drugs from your sister's boyfriend?

A About eight months.

Q Before that, where did you buy the drugs?

A A guy named Levi.

Q Is that in Stanly County?

A Yeah.

Q How long did you buy drugs from him?

A Just a couple years, probably.

THE COURT: What is Levi's last name?

THE DEFENDANT: Crawford.

[89] BY MR. LEVIN:

Q Before you bought the drugs from Levi Crawford, where did you buy the drugs?

A From a guy named Shane Rummage, R-U-M-M-A-G-E.

Q How long did you buy drugs from Mr. Rummage?

A Since 1992.

Q What kind of drugs did you buy from these individuals?

A Marijuana.

Q Only marijuana?

A Uh-huh (affirmative.)

Q Is that a yes?

A Yes, sir.

Q Did you offer for sale opium to Agent Boykin?

A Yeah.

Q It wasn't opium, was it?

A No, sir.

Q You were not being truthful when you identified it as opium?

A I thought it was. That's what I was told.

Q Where did you buy it?

A From a guy named Gene Scott.

Q How much marijuana would you say you purchased in total from all these people over the last six years?

MR. INGRAM: Objection.

THE COURT: Overruled.

BY MR. LEVIN:

[90] Q Let me ask that again. Approximately how much marijuana would you say you purchased, from the individuals you identified, over the past six years, dating back to 1992?

A I don't know. Probably, I would say, between 8 and 12 pounds total.

Q How many times have you visited these individuals?

A Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though. So, really, if you add it up; it wouldn't – it wouldn't be that much.

Q Did you have a pound in your knapsack on April 30th when you sold to Agent Boykin marijuana?

A I don't recall exactly what incident that was. Be more specific and I would answer for you.

THE COURT: Let him get his question out, then you can answer.

BY MR. LEVIN:

Q When you were in the vehicle behind the pawn shop on April the 30th, how much marijuana did you have in your knapsack?

A Eight ounces.

Q Is that in addition to the 114 grams that you sold to Agent Boykin?

A That was altogether.

Q Did you indicate to Agent Boykin, after he paid you the money, that you now had enough to go pay your supplier?

A I don't recall.

[91] Q Do you recall going to pay your supplier after Agent Boykin gave you the $360?

A I don't recall.

Q Did your supplier front you the drugs?

A Sometimes.

Q And then did you go pay your supplier after you made money from the sales?

A Yeah, whenever I got the money together.

Q Since 1996, since you opened up the first pawn shop, how many marijuana customers did you have?

A At first I only had a couple. Then I just – they just – a couple of their friends. Like I say, I didn't sell to but – about four people in the last three years.

Q In the last three years you have only sold to four people?

A I had four friends that bought from me.

Q You didn't have anybody else?

A No.

Q You had Agent Boykin.

A I mean, I had four people I dealt with until I was introduced to Mr. Boykin there.

Q So, prior to April 29th, you only dealt with four people?

A Yes, sir.

Q And what were their names again?

A Garland Pucket, Lee McRae, and a guy named Rick Wood, and my brother Rodney Deaton.

[92] Q And is Rodney your half brother?

A Yeah, he is my half brother.

Q Did Rodney bring other customers in like he brought in Agent Boykin?

A Yeah, he did before.

Q That would be four people, plus people Rodney brought in?

A Well, he brought – like I said, he would come up there and get it for other people.

Q Did he ever bring anybody else with him?

A I think he brought a guy up there, one guy named Chip Coyer.

Q So, now we have six people, including Agent Boykin?

A Six?

Q You have your four friends, Agent Boykin, and now Chip Coyer?

A Right.

Q Anybody else?

A Not that I know of.

Q Do you recall April 28, that is the day before you met Agent Boykin, did your half brother come visit you?

A Yeah, he sure did. He had a female with him. That's right. Yeah, sure did.

Q So, is that seven now?

A Uh-huh (affirmative.)

Q And you sold marijuana to her?

A Uh-huh (affirmative.)

[93] Q Is that a yes?

A Yes, sir.

Q Do you recall how much you sold to her?

A I think it was a half ounce that day.

Q How much did you get for a half ounce?

A $60.

Q Did you pay her $100?

A Huh?

Q Excuse me, did she pay you $100?

A No, sir.

Q How often would Rodney come visit you in the store?

A Oh, I would say Rodney only come around about twice a month.

Q And each time he came by, was it for the purposes of buying marijuana?

A No, sir. He is my brother. He just come around a lot of times to look at what I had.

Q Do you recall now – do you recall that he brought anybody else with him other than –

A No, because most of the time he come up there, you know, he would be getting whatever for somebody else, you know.

Q You indicated that – strike that. You have two businesses, don't you?

A No, sir, I only had one.

Q What is your one business that you identified?

A Harris Pawn Shop.

[94] Q Okay. Were you also selling marijuana? Would you call that another business?

A No.

Q You made money on it, didn't you?

A No.

Q You didn't make any money?

A No.

Q So, why did you sell marijuana?

A Basically, to be honest with you, I sold marijuana so what I would have left over I would have for free and wouldn't have to buy myself.

Q In that respect you made money, didn't you? You were getting something for free?

A Yeah, if you look at it like that.

Q So, then, it's a business, isn't it?

A No.

Q You had scales in your pawn shop?

A Yes, sir.

Q And you used those scales for weighing gold?

A Yes, sir.

Q And the gold is weighed and sold in the pawn shop?

A Yes.

Q You also used the scales to weigh your marijuana –

A Yes, sir.

Q – when you sold marijuana at the pawn shop?

* * *

[100] A I never didn't really profit nothing.

Q You got $360 from Special Agent Boykin?

A Right.

Q What did you do with that money?

A I put it in my wallet.

Q Did you always put the money in the wallet?

A Yes. Then I would take it over to my sister's boyfriend.

Q To pay him back because he fronted you the drugs?

A Right. Or if I bought it, then, you know, I would put the money back.

THE COURT: What's that now? If you bought it?

THE DEFENDANT: If I didn't get it fronted, if I went over to his house and paid him cash for it, then I would pay myself back with the money.

THE COURT: Where would you put that cash?

THE DEFENDANT: Back in the pawn shop.

BY MR. LEVIN:

Q In the cash register in the pawn shop?

A Yeah.

Q So, you carried your weapon to – was it to deter people so that these criminal elements or these elements that were attracted to the pawn shop, was it to deter them from robbing you?

A Yeah, hopefully.

Q Were you prepared to use it if you had to?

* * *

[23] of the $60,000.00 towards restitution. And in speaking to my client this morning, I know the Court has already ruled in that matter with respect to the co-defendant. We are in agreement this morning that we simply have no standing to make that objection, and we withdraw the objection, Your Honor.

THE COURT: Thank you, sir.

MR. JONES: That third objection, Judge, had to do with whether or not it's going to be a five-year minimum or a seven-year minimum on the first 924(c) charge, as the indictment would allege "carry." And our position would be that it does not also allege use, that it cannot then be – the brandishing cannot be applied in that case to make a seven-year mandatory minimum. Brandishing in our mind means anonymous use, brandishing means anonymously carried. I understand the government's position on that, Your Honor. I believe Your Honor has already ruled in a case similar.

THE COURT: You're arguing that brandishing is an element of –

MR. JONES: I do, Judge. The *Jones* case; *Jones* and the new case out of the Fourth Circuit. The name escapes me right now, but it's in my position paper. That – I understand that Your Honor has already ruled on that in the past and, again, we would just stand on the objection, Your Honor.

THE COURT: Well, you know, that's a good point to make. I did rule on it about a month ago and, in

fact, I [24] think it was a case in which Mr. Auld was involved. It couldn't have been this case, I don't guess.

MR. AULD: No, Your Honor. It was *Rudy Jackson*. Mr. Smith represented Mr. Jackson.

THE COURT: And, you know, there are two Supreme court decisions and we had a lengthy discussion at that time on the record. I don't know that there's any transcript on it about the Supreme Court's two decisions in that area and the way the Justices were lining up. And I think I quoted, as I recall, some of Justice Scalia's descending opinion in one of the cases. *Jones* it may have been. It was a little different situation there in which it appeared that the primary concern, as I recall, of the Court, was that any time you are increasing the penalties for which a defendant could be exposed, there ought to be some type of notice or jury finding on that, increasing the top end.

Here we don't have exactly that situation. There's no change in the maximum sentence that Mr. Whitt is exposed to here, I don't believe. It's just a maximum statutory penalty that he would be exposed to. It's just an increase, is it not, in the minimum situation, which I think makes a difference here.

Of course, Mr. Whitt also – the notice requirement was clearly satisfied, I think, in this case.

Anything, Mr. Auld, you want to respond to in that?

[25] MR. AULD: No, Your Honor. I think the Court has adequately set that out.

THE COURT: So we have, really, then, no issue the Court has not ruled on then. I denied the motion to

withdraw the guilty plea. I have indicated that the defendant could be exposed to multiple 924(c) counts on these six robberies. You've withdrawn your argument about the $60,000.00 toward restitution. You did mention, although you did not really wish to be heard, the five-level increase for the firearm set out in the presentence report. And you've made your argument on the *Jones* case, that the government was required to allege the brandishing in the indictment to increase the penalty from five to seven years. And the Court disagreed with that.

Any other factors that we need to consider concerning the presentence report, Mr. Jones?

MR. JONES: Judge, there were some minor factual variances about whether the gun was in the camper or not. And I don't think that would change anything for the purposes of sentencing. They're really not legal issues, and I don't think they need to be resolved unless Your Honor differs with my opinion on that.

THE COURT: All right. Well, the Court will find the remaining facts as set out in the presentence report and make it part of the record under seal in this case.

Now Mr. Whitt has a criminal history category of one

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	No. 1:99CR191-1
v.	:	
WILLIAM JOSEPH HARRIS	:	

DEFENDANT'S RESPONSE TO
GOVERNMENT'S POSITION
CONCERNING SENTENCING FACTORS

(Filed Feb. 7, 2000)

On January 11, 2000, the defendant filed a "Position of Defendant With Respect to Sentencing Factors and Response to Government's Objections." In that pleading, the defendant addressed the issue of the denial of a reduction in his offense level for "acceptance of responsibility" as set forth in the Presentence Report, and also responded to objections by the government to the Presentence Report in which the government asserted that a greater amount of marijuana should be attributed to the defendant than the Presentence Report attributes to him. On January 13, 2000, the government filed a "Position of the United States With Respect to Sentencing Factors," in which the government again presents the argument concerning the amount of marijuana to be attributed to the defendant, and also argues that the defendant should be sentenced to a seven-year mandatory prison term for his conviction pursuant to 18 U.S.C. § 924 because the conduct of the defendant meets the definition of "brandishing" a firearm within that statute. The defendant is

filing this supplemental response to address that latter issue.

The indictment in this case charged in Count Two that the defendant carried a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). That statute provides that, if a defendant is convicted of carrying a firearm during and in relation to a drug trafficking crime, the defendant shall be sentenced to a term of imprisonment of not less than five years. 18 U.S.C. § 924(c)(1)(A)(i).

The government now contends that the defendant should be subject to a term of imprisonment of not less than seven years because the defendant "brandished" the firearm in question, applying the conduct of the defendant to the definition of "brandish" in 18 U.S.C. § 924. The statute provides for a seven-year term of imprisonment if the firearm is brandished in 18 U.S.C. § 924(c)(1)(A)(ii), and in 18 U.S.C. (c)(4), that term is defined as follows:

> For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

The defendant admitted at trial that he wore a pistol in a holster on his belt every day during business hours at his pawn shop, and that he was wearing the pistol accordingly when he sold marijuana to the undercover agent on several occasions at the pawn shop. Therefore,

although the evidence supports a finding that the defendant displayed the firearm on those occasions, the evidence does not support a finding that the defendant did so "in order to intimidate . . . " the undercover agent who was purchasing the marijuana on four occasions.

The defendant testified that he wore the firearm during every business hour of every business day at the pawn shop, and that he did so solely for protection in his pawn shop business. The defendant testified that he left the firearm in a locked drawer at the pawn shop at closing time on every evening as he left the pawn shop, and that he never took the firearm home with him. He also testified that most of his marijuana transactions took place at his home, and only on rare occasions did someone come by the pawn shop to pick up marijuana from him. He testified that he never had a firearm in his home, and therefore he never carried or used a firearm in relation to the marijuana transactions at his home.

One of the defendant's marijuana customers, Lee James McRae, testified that he was present in the pawn shop on many occasions when the defendant closed the shop at the end of the day, and he always observed the defendant to lock up the firearm and leave without the firearm. McRae also testified that he has never observed the defendant outside of the pawn shop in possession of his firearm, and that he, McRae, has purchased marijuana from the defendant only at the defendant's home. McRae had never observed the defendant to have a firearm in his residence.

All of those uncontradicted facts suggest that the defendant was not wearing the firearm on the occasions

when he sold marijuana to the undercover agent for the purpose of "intimidating" the agent. Moreover, the context of the meetings with the undercover agent, and the content of the conversations which took place during those meetings, demonstrate that those meetings were casual, friendly, and without even a hint of anyone being intimidated, or needing to be intimidated.

For example, the tape recording of the encounter between the defendant and the agent on April 29, 1999 (which included the remarks by the defendant about the power of his pistol and the ammunition), reveals a conversation of almost an hour in length in which many other subjects were discussed other than the marijuana transaction or the firearm. In fact, the discussions about the marijuana purchase and the firearm lasted approximately five to seven minutes out of a one hour conversation.

The tape reveals that, after the agent entered the pawn shop, approximately thirty minutes of conversation then ensued about guitar playing, friends who play in bands, various rock guitarists, how to play certain guitar chords, and the pros and cons of keeping an inventory of guitars in a pawn shop. The agent himself participated actively in that discussion. In the background, there is raucous laughter and conversation involving at least several other persons who were present at the time. Most importantly, the encounter between the defendant's half-brother, Rodney Deaton, accompanied the agent to the pawn shop and was present during this lengthy conversation.

In short, the tape reveals that neither the defendant nor the agent were tense, cautious, or anything other than at ease with each other in this conversation. The presence of the defendant's brother further underscores the defendant's comfort level with his customer, the undercover agent. Therefore, the defendant contends that the facts of this case do not justify a conclusion that the defendant "displayed all or part of the firearm, . . . in order to intimidate . . . " the undercover agent.

Moreover, the defendant contends that the government cannot rely on the "brandishing" clause of 18 U.S.C. § 924(c) to support the seven-year term of imprisonment because that clause is not merely a sentencing enhancement, but is an element of a separate offense which the government was required to specifically charge in the indictment and prove beyond a reasonable doubt at trial. *See Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). In the *Jones* case, the Supreme Court held that the provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing significantly higher penalties when "serious bodily injury" or "death" results, created separate offense elements requiring proof beyond a reasonable doubt. The defendant contends that the same analysis applies in this case for the following reasons.

First, the pertinent portions of 18 U.S.C. § 924(c) and 18 U.S.C. § 2119 are virtually mirror images of each other. Each statute contains a general clause stating the conduct that is prohibited, (in an incomplete sentence), and then a subsection of that clause provides the penalty provision. Next, each statute then contains, a second subsection, providing for increased penalties under certain conditions – i.e., in the carjacking statute for "serious bodily

injury" or "death," and in 18 U.S.C. § 924(c) for "brandishing" a firearm. See copies of the relevant portions of each of these statutes attached hereto as Exhibit A. The structure of these two sections is strikingly similar, if not virtually identical.

The analysis of the Supreme Court of the carjacking statute also fits 18 U.S.C. § 924(c) like a glove. The Court initially recognized that the serious bodily injury provision of the carjacking statute was contained in a separate subsection from the first section of the statute, in which the primary elements of the crime were listed, and therefore the statute "had a look" that suggested that serious bodily injury was merely a sentencing factor. *Jones v. United States*, 119 S. Ct. at 1219. However, the Court concluded that this appearance was deceptive for several reasons.

First, the Court noted that the serious bodily injury section established "steeply higher penalties" than cases not involving serious bodily injury. Moreover, the Court noted that the "steeply higher" penalty range was conditioned on a further fact – i.e., whether serious bodily injury occurred – a fact which was just as important as the primary elements of the crime. Finally, the Court noted that the serious bodily injury subsection was not really a separate section, because the first clause of the statute would constitute an incomplete sentence without it. *Id.* at 1219-20. That precise analysis applies to 18 U.S.C. § 924(c).

Next, because the text alone did not justify any confident inference as to whether the serious bodily injury language was a sentencing enhancement or an element of

the offense, the Supreme Court considered whether or not other federal statutes included serious bodily injury as an offense element. The Court concluded that Congress has frequently, although by no means always, treated "serious bodily injury" as an offense element in other context. *Id.* at 1220-21. The Court also noted that bodily injury often was an offense element in analogous state statutes as well. *Id.* at 1221-22.

The defendant has not identified any legislative history which directly speaks to the issue of whether "brandished" was intended to be a sentencing factor or an offense element. Notably, the Supreme Court did not rely heavily on legislative history in *Jones*, either. However, the defendant has identified two statutes, one from West Virginia and one from the United States Virgin Islands, in which brandishing a weapon is a crime in and of itself. *See* W. Va. Code, § 61-7-11, a copy of which is attached hereto as Exhibit B, and VI Code Ann. tit. 14 § 621, a copy of which is attached hereto as Exhibit C. The Supreme Court recognized that it would be an "oddity" to find a term to be a statutory crime with its own offense elements in one instance, and merely a sentencing consideration in another instance. Because "brandishing" is a statutory crime with its own elements in two jurisdictions, judicial consistency calls for the term to be treated as an offense element, not merely a sentencing consideration.

Finally, in *Jones*, the Court asserted that, because its analysis under the above steps left open the possibility that serious bodily injury was a sentencing factor, the statute nevertheless should be construed as requiring that serious bodily injury be charged as an offense element

under the canon of constitutional avoidance. *Id.* at 1222-28. The Court concluded that treating any fact (other than a prior conviction) that increases the maximum penalty for a crime as a sentencing factor, rather than as an element of the offense, would raise concerns involving both Fifth Amendment due process and the Sixth Amendment right to a jury. *Id.* at 1224 n.6.

Because the carjacking statute in *Jones*, and 18 U.S.C. § 924(c) are virtually identical, the same analysis utilized by the Supreme Court in *Jones* compels a conclusion in this case that the "brandishing" section of 18 U.S.C. § 924(c) is an element to be proved by the government, and not merely a sentencing enhancement. Because the government did not charge that element in the indictment, and did not prove that element beyond a reasonable doubt at trial, the court cannot now apply that provision and impose the seven-year mandatory term of imprisonment as a sentencing enhancement.

Respectfully submitted, this 7th day of February, 2000.

LOUIS C. ALLEN, III
Federal Public Defender

/s/ William C. Ingram
WILLIAM INGRAM
First Assistant Federal
Public Defender
NCSB # 9884
101 S. Elm. St., Suite 210
Greensboro, NC 27401
Telephone (336) 333-5455

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the below-mentioned persons by mailing a copy of the same to the following addresses:

Mr. Steven H. Levin
Assistant United States Attorney
P. O. Box 1858
Greensboro, NC 27402

This, the 7th day of February, 2000.

/s/ William C. Ingram
WILLIAM C. INGRAM
First Assistant Federal
Public Defender

EXHIBIT A

18 U.S.C. § 2119

§ 2119. Motor vehicles

Whoever, with the intent to cause death of serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

---

18 U.S.C. § 924

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

EXHIBIT B

WEST VIRGINIA CODE 1966
CHAPTER 61. CRIMES AND THEIR PUNISHMENT.
ARTICLE 7. DANGEROUS WEAPONS.

Copyright © 1966-1999 by LEXIS Law Publishing, a division of Reed Elsevier Inc. and Reed Elsevier Properties Inc.
All rights reserved.
Current through End of 1999 2nd Ex.Sess.

§ 61-7-11 Brandishing deadly weapons; threatening or causing breach of the peace; penalties.

It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than one thousand dollars, or shall be confined in the county jail not less than ninety days nor more than one year, or both.

EXHIBIT C

VIRGIN ISLANDS CODE ANNOTATED
TITLE FOURTEEN, Crimes
CHAPTER 31, Disorderly Conduct

Copyright ©1999 by The Lieutenant Governor for the Government of the United States Virgin Islands

Current through End of 1999 Reg. Sess.

§ 621 Brandishing, exhibiting, or using deadly weapons

Whoever –

(1) not in necessary self-defense, and in the presence of two or more persons, draws or exhibits any deadly weapon in a rude, angry, and threatening manner; or

(2) in any manner unlawfully uses the same in any fight or quarrel –

shall be fined not more than $200 or imprisoned not more than 1 year, or both.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM JOSEPH HARRIS, Defendant.	Criminal Action No. 1:99CR 191-1 Greensboro, North Carolina February 17, 2000 11:30 a.m. (Pages 1-48)

TRANSCRIPT OF SENTENCING HEARING

BEFORE THE HONORABLE WILLIAM L. OSTEEN, SR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:
STEVEN H. LEVIN, ESQUIRE
Assistant United States Attorney
Post Office Box 1858
Greensboro, North Carolina 27402

For the Defendant
William J. Harris:
WILLIAM C. INGRAM, ESQUIRE
Assistant United States Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401

Court Reporter:
Mary Jo Beck, CSR, RPR, RMR
Room 101, U.S. Courthouse Building
324 West Market Street
Greensboro, North Carolina 27401

Proceedings reported by stenotype reporter. Transcript produced by computer-aided transcription.

* * *

[2] (Defendant present.)

MR. LEVIN: Government calls *United States of America versus William Joseph Harris,* Case Number 1:99CR191-1. Mr. Harris is represented by his attorney Mr. Bill Ingram, and this matter is on for sentencing, Your Honor.

THE COURT: All right. Let me get my file straight here. Mr. Ingram, are you and your client ready to proceed here today?

MR. INGRAM: Yes, Your Honor.

THE COURT: There were two objections filed to the presentence report prepared by Mr. Wright, one by the Government and one by the defendant.

Mr. Ingram's position is that the weapon should not be counted in association with his criminal activity, that the weapon was there for the pawn shop operation and not the drug operation.

And the Government had two objections, didn't you?

MR. LEVIN: Actually, Your Honor, the Government initially objected on two grounds, that there is a seven year mandatory minimum sentence, and that the amount of drugs should be eight to twelve pounds.

The first issue was resolved in the PSR, which now reads seven years, but we still have our objection to the weight of the drugs. I believe Mr. Ingram, on behalf of his

client, has two objections: One is the acceptance of responsibility, and [3] the second is the seven years versus five years.

THE COURT: All right.

MR. INGRAM: That's correct, Judge.

THE COURT: I suppose that the acceptance of responsibility, if we put it in proper course, is your duty to show the Court by the greater weight of the evidence that you're entitled to acceptance of responsibility. And it would be your duty to show that the seven years is appropriate rather than the five years, isn't that right, Mr. Levin?

MR. LEVIN: Yes, Your Honor, in addition to the weight.

THE COURT: Right. Then let's take that one first.

Do you have something, Mr. Ingram?

MR. INGRAM: Take which one first?

THE COURT: We will take the seven year matter first.

MR. LEVIN: Your Honor, hopefully the Court has had an opportunity to review the position paper. I don't wish to regurgitate everything that is in there, but the statute does read that if an individual brandishes a weapon, there is a mandatory minimum of seven years.

In this case the evidence established that the weapon was brandished. The definition of brandishing being that it was made known to another. The evidence at trial

established that the defendant on several occasions, in particular on the occasion which is charged in the indictment, the defendant displayed a firearm. In fact, he talked about the weapons being [4] able to protrude a bullet proof vest worn by a police officer.

Clearly, that satisfies the definition of brandishing under the statute; and on that alone, that's enough to make the seven year mandatory minimum sentence.

THE COURT: Tell me this, Mr. Levin, which may be set forth in the transcript, but I really didn't look for it, what was the occasion that caused Mr. Harris to hand over the weapon and talk about the bullets that were of a different make, and that's when he got into that comment about this is what can happen to a police officer, a law enforcement official? What conversation, if we can determine, led up to the showing, pulling out of the weapon and showing the bullets?

MR. LEVIN: Your Honor, I am hesitant to recite what the conversation was. The agent is not here, and I can't say that I recall with certainty the conversation in order.

I know there was a significant conversation on tape prior to the drugs being sold. There was just a casual conversation, the agent and defendant were getting to know one another. I know that prior to the drugs being discussed, Agent Boykin observed the weapon, and they discussed the weapon. I can't say if Agent Boykin said tell me about the weapon, who instigated the conversation about the weapon, but they did discuss the weapon, the power of the bullets. And then, I believe immediately afterwards, and I might stand corrected, but I believe

immediately afterwards the discussion about the drug [5] sale commenced.

THE COURT: Let me tell you, Mr. Levin, that you can address it. I'm not sure what Mr. Ingram's position is, in addition to his written submission, but I don't know what part of the defendant's business was drugs and what part was pawn shop operation. And it's not really material what part was.

What is material, I think is the fact that the defendant had a gun during the drug transaction, and there is no way that I can find that that was not for and during the drug transaction, because I think the facts would indicate that they were. So, I don't have any problems with that. But the gun was visible when these people walked up, as I understand it. And I believe, in totally legitimate pawn shop operations, there are people who do the same thing, that is, carry a gun.

I'm aware of what the commentary is on the brandishing a gun, but I have a hard time when a person is doing a legal act, if this man had a right to carry a gun, and I don't know the answer to that at this point, I am simply assuming that he had a right to carry a gun during his legal business. If he did, then in order to avoid the enhancement, if he wants to engage in criminal activity he has got to say excuse me while I take my gun off. Let's not talk about business until I take my gun off and put it somewhere out of sight.

Now, I am carrying my business on with you, and if I get caught, I'm at least not subject to an enhancement for that. It [6] bothers me that we might be dealing with a legal act that is clearly wrong if you're carrying a gun,

but brandishing enhances the penalty for it. And I may not have articulated very well what is giving me a problem, but I have some problem if that is the factual scenario.

Do you understand, not whether you agree or not, but do you understand the problem I am trying to raise in my own mind?

MR. LEVIN: Yes, sir.

THE COURT: All right. Tell me, what's the answer here?

MR. LEVIN: Your Honor, he wore – I think the evidence established at trial that the defendant carried the weapon for two purposes, or for one purpose, depending on how we look at this, but he carried it during his legitimate pawn shop trade, and he carried it during his unlawful drug trade. It served a dual purpose: To protect the lawful proceeds and to protect unlawful proceeds.

THE COURT: Right.

MR. LEVIN: It was worn to intimidate would-be criminals who would steal the lawful proceeds. It was worn to deter or intimidate people who wanted to steal his unlawful proceeds.

THE COURT: Do you concede that he had a right to wear it while he was carrying on his legitimate business or is that something we don't know?

MR. LEVIN: I don't know. I have no reason – I know that pawn shop owners do carry them, they have a

right to. I [7] don't know in this particular case if the defendant had a right to. I don't contest – I just don't know enough to contest.

THE COURT: If he didn't have a right to, that makes a difference to me. So, maybe Mr. Ingram can tell us whether he had a right to carry this gun.

MR. INGRAM: Your Honor, I think it was on private property. So, I think anybody has a right to carry a gun, wear it on the hip, in your premises or in your home.

THE COURT: I don't know if that's the law, that you can carry it in a business. And I really am asking, is that the law?

MR. INGRAM: I can't say definitively. That's what I believe is the law, but I can't say definitively. I can tell Your Honor that I have listened to the tape in question in its totality about a week ago, again. Of course, Your Honor heard about five minutes or so of that tape. It's about an hours worth of conversation, and that five minutes comes 30 to 40 minutes into that conversation. Up to that point they have been talking about, as I pointed out in my position paper, guitars, and how to play the guitar, and various rock bands they admired, and what bands they played in. And it was the ATF agent who first brought attention to this particular weapon, I think referring to that "hog leg" you're wearing there. That's when Mr. Harris took it out and showed him, and showed him the ammunition and told him about it.

[8] THE COURT: Okay.

MR. INGRAM: I have the tape here, if you want to listen to it.

THE COURT: I will be guided by what you say on that, unless Mr. Levin wants to take issue with it. If he does, I will either let him listen to it or play it, or whatever he wants to do. But I am going to, for my purposes of discussing the matter now, I am making two assumptions: One is that he had a legal right to wear that gun for his pawn shop business; and, two, that he did not pull the gun from the holster or mention the gun until asked by the agent about it. If either one of those is wrong, it would change my problem that I'm having, substantially.

MR. INGRAM: If it helps Your Honor in your assumption about the legality of his carrying a firearm, he obviously has not been charged with any firearm offense in state court. And if you recall, there was testimony that a deputy sheriff came by every week or two weeks to check pawn tickets, like they do in every pawn shop. So, there was a law enforcement officer coming through a couple times a month on an average while he was wearing that firearm, and apparently there was no problem perceived at that point.

THE COURT: That may help some. I don't think it resolves it completely. But you all understand where I am driving at here, and I will give you an opportunity.

[9] Now, Mr. Levin, I will hear from you.

MR. LEVIN: Even with those assumptions, Your Honor, he was – the defendant was brandishing the

firearm under the definition. There is not a whole lot more to say.

THE COURT: I understand.

MR. LEVIN: He was intimidating would-be criminals, whether they were stealing lawful proceeds or unlawful proceeds. That was the purpose. He even admitted in the – at trial, I can cite to the page of the transcript where at least he admitted at some point it was to – it was to deter. And I will just read it to the Court –

THE COURT: I read that this morning. I read it again this morning.

MR. LEVIN: So, again, it's a dual purpose, and it matters not whether he was carrying it for both purposes or just the one, to intimidate people in general. Those people in general, among those are people who are buying drugs from him, and that's enough to put him in that category of seven years.

THE COURT: I guess what you would say, if you were out instructing the public, is don't deal in drugs, deal in legitimate work. Don't deal in drugs. But I guess you may have a question that would put you in a position of saying well, it may be legitimate to carry a gun during the time that you're carrying on your legitimate activity, but if you're going to then suddenly deal in some illegal activity, be sure and take [10] your gun out of sight so that nobody sees it on your person, because if they see it, that automatically gets you two extra years.

MR. LEVIN: Your Honor, I would hate to be in a position where I am arguing with that type of business, but I think that's the point well made.

THE COURT: I think I certainly understand the point you're making.

Mr. Ingram?

MR. INGRAM: Your Honor, the law that we had to hurdle, and did not successfully hurdle at the trial about whether or not the firearm was carried during, which was not disputed, but was carried in relation to a drug offense, and what I'm about to argue right now will be flying in the face of what I will argue if this is appealed, but the law on that point was that it can be deemed to be carried in connection with the offense if it even just had the potential to facilitate the offense.

So, I think there is nothing inconsistent in the Court finding necessarily that the firearm was carried in relation to the drug offense, but finding that he did not brandish it, that is, display it, for the purpose of intimidating another person, specifically the drug customer. My argument, of course, is premised on two bases: One is the factual case as we're arguing now, and then on the *Jones* analysis, which we haven't gotten to yet. But on the facts, I think it is important that the [11] defendant's brother was there, he introduced them, indicating a comfort level.

This was not a high-anxiety type, back-alley type meeting where you're meeting with somebody you don't know and have no way to know. His stepbrother introduced him, and was there, participated in the conversation. The tape, as I pointed out in my paper, there are voices in the background suggesting there are other people there, and quite often there is a lot of laughter, and if it was anything other than a situation where somebody

from listening to it would conclude that there was some need to intimidate or somebody was intimidated or needed to be intimidated there.

THE COURT: Mr. Ingram, that really is what causes me great difficulty with your side. There can be, in my mind, no doubt but that that gun was there both for legal purposes and illegal purposes, to let everybody know ahead of time I have got a gun here, so there better not be any problems with me.

Now, the fact that the brother brought him in, and so it was a convivial group of people, doesn't make the fact that people dealing in drugs are all nice people. They are not. There are some people who wouldn't hurt a flea, who deal in drugs. But if you're going to deal in drugs, your chances of dealing with violent or bad people are greater than if you don't deal in drugs –

MR. INGRAM: I understand that.

[12] THE COURT: – in my opinion.

MR. INGRAM: And the facts I'm talking about here, I am pointing especially to the conversation about the firearm and the ammunition and what it could do. I think if the Court were looking to that small part of the total conversation and saying therefore he must have been intending to intimidate because he talked about how powerful the ammunition was, I'm putting that into the context of the whole conversation and saying that conversation does not indicate that, because first of all it was an hours conversation. There were other topics discussed. It was a low-keyed discussion. And it was, as the Court pointed out, it was the ATF agent who actually brought

first specific attention to the firearm that led to that conversation.

So, I'm not suggesting, as Your Honor said, that just because it was a low-keyed discussion that he might not have had it, therefore the purpose of dealing with a higher risk drug client, who might have come by at some other time, but just rather to put the discussion about the firearm itself into context.

THE COURT: Let me tell you that I am not going to consider for purposes of whether to enhance or not the conversation about the gun as it was handed over and the bullets, because I am on the assumption that that was asked for by the agent and not voluntarily done by your client. Mr. Levin will have an opportunity, if he feels it appropriate, to contest [13] my assumption, but until he does –

MR. INGRAM: To be fair, I will say that my recollection is not that the agent said something like that's quite a firearm you have got there, let me see it, then the defendant handed it over. I think there was some discussion about guns in general, then the agent pointed or indicated to the firearm saying that's quite a hog leg you have there. That's at the point which the defendant took it out and showed it to him, and maybe handed it over to him. I don't recall that he handed it over to him, necessarily.

THE COURT: Let's first, before we proceed further, there seems to be some question over here. Let's find out what Mr. Levin's position is on that.

MR. INGRAM: All right.

THE COURT: Just that.

MR. LEVIN: With regard to that issue, we're in agreement that Agent Boykin pointed to it, the defendant pulled it out, then the defendant did discuss the power of the weapon.

THE COURT: Then we're on the same track.

Go ahead, Mr. Ingram.

MR. INGRAM: Well, Your Honor, unless you want to proceed into the *Jones* argument, I think I have pointed out what I wanted to about weather [sic] or not the facts of the case fit the definition. Obviously, the definition of "brandish," because there is a definition of it, means there must be some [14] circumstances where a defendant can carry a firearm in relation to a drug offense but not brandish it, and because brandish is defined in the face of every other definition of brandish I have seen. But nevertheless, that's the way Congress chose to define, as displaying it, but they further conditioned that on with this intimidation element.

So, obviously, displaying it, they must have contemplated circumstances where just displaying the firearm would not be – would not fit the definition of brandish. That is where displaying it is not for the purpose of intimidating the person.

THE COURT: All right. By the way, I do want to comment parenthetically that I thought the briefs discussing the *Jones* case, its application and non-application, and the briefs submitted by both sides in this case, were outstanding. Both of you had very good briefs, so I commend both lawyers for doing some hard work here.

MR. INGRAM: Thank you.

MR. LEVIN: Thank you.

THE COURT: Go ahead.

MR. LEVIN: I will pass that along to Mr. Auld from our office.

THE COURT: Whoever did it. I'm giving you credit for it.

MR. LEVIN: Your Honor, if I can just finish up on that last point.

[15] THE COURT: You may.

MR. LEVIN: In fact, a firearm need not even be visible in order for the brandishing definition to apply. And that's in the definition itself, whether the firearm is directly visible to that person.

THE COURT: Give me that section.

MR. LEVIN: It's in 18 USC 924 (c) (4).

THE COURT: Okay. I have got you.

MR. LEVIN: That's where I was quoting, Your Honor. So, just to finish strong, Your Honor, we have the defendant testifying in trial that he wore that weapon to deter would-be criminals. Clearly, that – he had it visible, and he wore it to deter, that should satisfy the definition of brandishing, Your Honor.

If there are no further questions from the Court on that issue –

THE COURT: Let me have your statute book there, one of you.

MR. LEVIN: Your Honor, I may have missed our strongest argument. For purposes of this subsection, "brandish" means to display all or part of the firearm, and that's followed by the disjunctive, or otherwise make the presence known.

Well, clearly it was displayed, and that would seemingly satisfy the definition of brandish. That's the simplest argument.

[16] THE COURT: All right.

MR. INGRAM: As a former English teacher I will have to take issue with that. I think the disjunctive is to display all or part of the firearm or otherwise make the presence known. The [sic] in order to intimidate that person qualifies both of those phrases. It's not to display or to otherwise make the presence known with the intent to intimidate.

That just logically doesn't make any sense. You can display it, or in the alternative you can say I have got the gun in the drawer over here for the purpose of intimidating. For the purpose of intimidating I think, clearly, gramatically, [sic] qualifies both of those phrases.

THE COURT: All right. I do think that it does qualify both of those phrases.

Let's look back at Mr. Harris' testimony dealing with this display. What page is that on?

MR. LEVIN: Your Honor, bottom of page 100.

THE COURT: All right.

MR. INGRAM: Your Honor, I will refer Your Honor to the further discussion between Your Honor and Mr. Harris, beginning on page 103, specifically about that.

THE COURT: As I read the transcript, it was found from the transcript that Mr. Harris carried the weapon at all times in his pawn shop. He carried it in a displayed manner, and he carried it to, in his words, deter people, and in case he needed [17] it.

Where the Court has difficulty, and was evidenced from its line of questioning, was how Mr. Harris could make a distinction between needing it in detering people in the legitimate pawn business and illegitimate drug business. The best answer that the Court could find from Mr. Harris in that connection was, well, I knew that I could not report it to the police if it was trouble with illegitimate work, but I could report it if it was legitimate work.

Giving some credibility to that, not a lot, but some, Mr. Harris was then asked under what circumstances would you use the gun, and he indicated if his life was threatened he had to use it. But then he tried to distinguish between illegitimate and legitimate business, which the Court can find no bright line for if an individual is ready to use the gun in his own protection of his stash, and he said he was, if he is willing to use it in protection of his own – I don't know what he meant by stash, but he did say, in direct answer to one question, I believe, that he would use it to protect his stash. Let me back up and make sure I'm correct on that.

MR. INGRAM: Your Honor, on page 104.

THE COURT: 104.

MR. INGRAM: Line 7. I think it was actually Your Honor who used the word stash, and I think you were using that in contrast to the next question about drugs. So, at least when I [18] heard Your Honor ask that question, I assume by stash you meant his cash.

THE COURT: Okay. I shall find that that was the answer in connection with his legitimate business. Stash is usually not connected to legitimate business. But the line of questioning here would lend credibility to your position, Mr. Ingram.

I will find that that's what that line of questioning was for, Mr. Ingram, and will not hold him to a stricter standard on that. But the line of demarcation between use of the gun for protection of legitimate, as opposed to illegitimate activities, seems to the Court to be one that does not have much credibility. And if the gun is used for emphasizing an intimidation factor, even though it may be for legitimate purposes when it deals with pawn shop activity, it is not for legitimate purposes when it deals with the drug transactions.

I do find that the definition of "brandish" means that, with respect to a firearm, to display any part of the firearm or otherwise make the presence of the firearm known to another person in order to intimidate that person regardless of whether the firearm is directly visible to that person.

I would find that the purpose of this firearm was to intimidate people, to give Mr. Harris control of his activities. Though I think it is a close question on brandishing.

And I will find that he had a legitimate right to have it during his [19] legal business, that he had no right to have it during his illegal business, and that it was there for protection and intimidation. I think it meets the definition that is there. I don't think that is a proper definition, but that's what the definition is under the statute. The Court feels bound to follow that. For that reason – yes, sir.

MR. INGRAM: Your Honor, I don't normally continue to argue after the Court has given an indication of its ruling, but I did want to point out a couple other things, that I think the most important thing that Mr. Harris was telling you, in drawing a distinction between why he was wearing the weapon for the purpose of deterrence in his business and why he was not wearing it for that purpose in the drug sale, was that he repeatedly told you that it's because I was dealing with my friends or somebody that my brother brought to me.

I would hate for the Court to have a concept of "drug transaction" as a generic; every drug transaction is alike. I have represented enough people, and spent ten years on a university campus working, to know that there are networks of people who buy marijuana, and buy enough to get some to sell to my friends, or get some at the same time, and just situations that are not your typical high-risk drug transactions.

I think there is a distinction in some – to call this a drug transaction, I think, is to do disservice of the reality of what was going on here. Also, he testified that – if you [20] remember, there was testimony that most of the drug transactions took place in his home. It was only on rare

occasions that one of his friends, who he was buying for and selling to, would come by – call him and say can I come by the shop and pick it up. And there was testimony, and nothing to contradict this, that in all of the other drug transactions that took place outside the shop, which was the majority of them, there was never any firearm there.

So, I think that also gives credence to his assertion that I was wearing the firearm in the shop to protect my business. It never occurred to me to use the firearm in relation to a marijuana transaction because I was dealing with my friends, just like I was dealing with them at home or somebody that my brother brought in, so I had a comfort level.

So, I think the fact that – recognizing the fact that there are some situations that are, in fact, low key transactions among friends or acquaintances, as distinguished from a true high risk, as I referred to earlier, a back alley deal with somebody you have never dealt with before in the first place, much larger amounts than we are talking about here, we're talking about basically user amounts, large user amounts, but nevertheless user amounts here, and the fact that the evidence was uncontradicted that he had never even carried a firearm outside of a shop.

The evidence was that everybody who testified said when [21] he left in the evening he would lock it up. When he came in in the morning he would put it on. Never seen a firearm in his home. He even had one young man who bought marijuana from him and said I bought it from his home and he never had a firearm there to my knowledge. So, I know Your Honor may have

already made a decision, but I feel like I would be remiss if I didn't point out those factual matters.

THE COURT: I understand those distinctions that you're trying to make, Mr. Ingram, but I have a real problem in – I guess you must concede that it was there for intimidation purposes for people who did not act properly in the pawn business.

MR. INGRAM: He admitted that.

THE COURT: And he certainly admitted that.

MR. INGRAM: But he repeatedly denied, when asked by Mr. Levin or Your Honor, and perhaps even me, that he ever even considered using the firearm in relation to any marijuana transaction.

THE COURT: I'm not so sure that was a free-use decision, rather than I never had reason to use it in the drug transaction. I'm not sure that he said, and I don't think he did say, I thought about this thing, and I decided I didn't need to use this gun in my drug transactions. I would find that sort of difficult to accept myself. I think what he was saying was I never had to use it, so I never considered using it during the [22] drug transaction, and that's different from saying I preconceived that I would not use it during the drug transaction.

MR. INGRAM: No, Your Honor, I don't think he necessarily would have said I had thought about it ahead of time and decided I would never use it in a drug transaction. I think what he would say, and the implication of what he testified to would lead to the conclusion his position is that it never occurred to me. I deal with my friends.

THE COURT: To use it.

MR. INGRAM: To use it in a drug transaction. Never occurred to me, because I sell marijuana to people at home. I don't carry a firearm there. Never occurred to me to carry a firearm there. I occasionally sell it to somebody who comes by the shop, but it never occurred to me that – it's almost like I'm unaware I have this firearm on in relation to a drug transaction.

THE COURT: But how can I turn it on and off, Mr. Ingram? If I am wary of you, because you look to me like a violent person, so before I meet you I decide I'm going to strap a .45 on my side and then go argue with Bill Ingram, if he gives me any trouble he will see that gun. Now, that's intimidation. And then I see Mr. Levin, who I know has never struck a lick at anybody, he is Mr. milk toast in dealing with people, but I have a problem with him right after I talk with you, so I argue with [23] him. Is that not there for the purpose, the same purpose to which it was originally put?

MR. INGRAM: I would still say you're carrying the firearm for the purpose of intimidating me, but it seems to me you have just admitted I'm not carrying the firearm to intimidate Mr. Levin, because he is Mr. milk toast, which I think we can all take recognition of.

THE COURT: If Mr. Levin decides to swing and I do not use –

MR. INGRAM: I think you can give any hypothetical where you can say, for example, one of these people was his friend. You can ask a question that says you're dealing with your friends, and that's why, if you

had happened to not have on your firearm in the shop if one of them came by, but then one of them pulled out a gun, wouldn't you have wanted to have it on, or if you had it on wouldn't you use it? It's a hypothetical, but would never happen in his mind.

You can always give a hypothetical in some situations where the completely unexpected happens, that if you had a firearm you would use it, or if you had a stick you would use it, but that is a hypothetical. And I think what we're talking about is whether or not he brandished for the purpose of intimidation or displayed, as it's defined, for the purpose of intimidation in these particular transactions, not hypothetically what if a 6'5", 240 pound guy, wearing two [24] six-guns came in and asked about buying marijuana, wouldn't you have relied on your firearm. Under those circumstances, I probably would say yes, but that's a hypothetical. That's not what happened here.

THE COURT: The only thing that happened here is he had it during the drug transaction. That's all we have here.

MR. INGRAM: Right. And I think, as I said earlier, there is nothing inconsistent in the Court concluding it on the matter of guilt or innocence that the firearm was carried in relation to the drug crime, that is, because it had a potential; at a minimum, what the Court could find to base a finding of in relation to, or in connection with, that it had the potential for that.

And you are talking about hypothetically, but under the guidelines, where there is a different definition, I think Your Honor is limited to consideration of whether

or not he displayed this firearm in these circumstances for the purpose of intimidation in the drug sales in question here.

THE COURT: All right. I think it is a close question, Mr. Ingram, and I certainly see the argument that you're making. I have a hard time drawing a bright line between one who is engaged in legitimate ways of carrying a gun for intimidation, for those purposes, and turning it off for intimidation purposes if there is an illegitimate, illegal activity going on.

You have got additional support on your side in that it [25] was not used outside this place. There is no evidence that it was ever used there. But the evidence is that it was there during the drug transaction, and I don't think that he turns off his intent to use it for intimidation and authority simply because in this case I think I trust this guy.

MR. INGRAM: If I may give just one more example that occurs to me.

THE COURT: Sure.

MR. INGRAM: Hypothetically, people come in every month or so asking can I put a poster up in your window about my particular event. And they're not there to transact business, they're there purely for the purpose of asking can I put a poster up. I think he would say no way was I wearing a firearm to deal with people like that. Somebody who comes in just –

THE COURT: What if the man had said I don't care what you say, I'm putting it up anyhow, and the only way you're going to get me out of here is whip me?

MR. INGRAM: I was going to say suppose one of those people came in and got so angry that he couldn't put it up that he attacked him? Obviously, he would use it if he had to. That's a hypothetical that is so far at the end of reality of what might happen.

I mean, I am simply saying there could be an example under any circumstances, if you testified that my mother comes to my home frequently, and I would never use a firearm against [26] my mother. Well, what if she pulled out a bat and swung it at you? Well, yeah, I guess I might under those circumstances. But there isn't a hypothetical under any factual scenario I can think of where you can't say but what-if. And obviously, the answer could be sure, I might use a firearm under those farfetched, but nevertheless – and improbable, but nevertheless possible hypothetical facts.

THE COURT: All right. I certainly understand the argument, Mr. Ingram, and I think it's an impressive argument, as well as your paper, but I will have to find that my reading of this would include brandishing as carrying an exposed weapon during the transaction, and I will so find.

Now, is there another objection that you have?

MR. INGRAM: Your Honor, I objected to the denial of acceptance of responsibility under the calculation of the guidelines of the presentence report, that would take Mr. Harris from a level eight, criminal history category one, zero to six range, to a level six, zero to six range. So, it's almost – it is pretty much irrelevant under those circumstances, but I pursued that because Mr. Levin is asking that more drug amounts be attributed to

him, and it would have significance if the Court agrees with Mr. Levin on that.

THE COURT: Okay. Let's talk about that then, Mr. Levin.

MR. LEVIN: Your Honor, as addressed in the position paper, the defendant at trial acknowledged that he had been [27] purchasing between 8 to 10 – had purchased between 8 to 10 pounds – 8 to 12 pounds of marijuana over a six year period. And I argue in the position paper that this is attributable drug weight to the overall computation.

THE COURT: In that it should be used to calculate what?

MR. LEVIN: Well, it's relevant conduct to the overall conduct of the defendant, in that he was purchasing – he was selling drugs from his pawn shop. Granted, I have to admit that I did not flesh it out or elaborate on it as well as I might have at trial, and certainly it came from the defendant's lips that he had dealt between 8 to 12 pounds of marijuana over a six year period. He did not say that he sold it from the pawn shop. It wasn't that clear, and I didn't pursue that. In fact, I have quoted the detail in my position paper, and that's the detail – that's as detailed as I got at trial. I think it's a legitimate argument.

THE COURT: I do, too. I think it's very close, and it's certainly a legitimate argument. All right, sir.

Mr. Ingram, I will hear you on that.

MR. INGRAM: Your Honor, those two questions and two answers are on page 90, at lines 1 through

9. It certainly is not – the testimony is not a direct question, how much marijuana have you sold or purchased in the last six years, definitely eight to 12 pounds. There is – it is nowhere near that unequivocal.

[28] The answer initially is "I don't know," followed by "Probably, I would say, between 8 and 12 pounds total." And that, alone, is pretty equivocal about how much it was.

Then the next question is, "How many times have you visited these individuals," that is, the people that you were selling to? And again, he said, "Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though. So, really, if you add it up, it wouldn't – it wouldn't be that much."

So, at that point, it appears to me he is saying it wouldn't be 8 to 12 pounds. That is so sketchy and speculative that I think the Court cannot, even if the Court determines that sales outside of the pawn shop are relevant conduct, that that is too speculative to base an amount on that's going to kick somebody's guidelines up by four levels. It might have been clearer had there been follow-up questions about getting a more definite statement about how many times did you sell to this person, and how many times did you sell to the next person. On average, what quantity did you sell to this person, and to the next person. But you don't have that; you don't come anywhere close to that.

THE COURT: All right, sir. Mr. Levin, what do you say as to this line of questioning? Well, what do you say if the answer here is, well, I bought 8 to 12 pounds of marijuana from Sam Smith sometime during the last four

years for my personal [29] use? If that was said, would that be something that you would be saying should be calculated?

MR. LEVIN: If the argument is that the relevant conduct is conduct which is similar to that which is charged –

THE COURT: Which is selling.

MR. LEVIN: Which is selling. – then the answer would have to be no.

THE COURT: How do we know what the question was zeroing in on and what the answer was to?

MR. LEVIN: The best I can argue, Your Honor, is that he acknowledged purchasing between that weight, and he acknowledged selling to at least four people, and then when confronted with the fact that it was more than four people, he acknowledged it was at least six people.

THE COURT: Got up to six or seven people that he had sold to. Okay. How much did he sell?

MR. LEVIN: Well, we agree it was a small – it was user amounts, at least over a three-year period, he acknowledged.

And I'm trying to find where he acknowledged – at some point he did say monthly, bi-weekly, every other week, over a three-year period. That's what the defendant acknowledged.

THE COURT: All right. I will give you an opportunity to put that in there. Where is that?

MR. LEVIN: That's on page 90, Your Honor. I have to make sure I'm –

[30] THE COURT: "Question: How many times have you visited these individuals?

"Answer: Not – rarely. It was a monthly, bi-weekly, every other week sometimes. I wouldn't get that much, though. So, really, if you add it up, it wouldn't be that much."

MR. INGRAM: Your Honor, if you look on the previous page, the previous question was who were you buying it from. Then he asked who do you purchase it from. How much did he purchase from the individuals you identified.

THE COURT: Isn't that referring to – go ahead.

MR. INGRAM: In his answer, Mr. Harris says, "I wouldn't get that much, though." So, I think he is still thinking in terms of who he bought it from.

THE COURT: Isn't that responding to purchases?

MR. LEVIN: It is, Your Honor. I wasn't reading it correctly. And I acknowledge it is all not together clear.

THE COURT: I certainly understand it, and I think that is an appropriate thing to raise. I'm going to find that that is not to be calculated, because it is not sufficient from which the Court can find that it is similar conduct. It may very well be, but I just don't have quite enough to make that determination.

Therefore, under the revised report now that has been prepared, I guess I made findings that are consistent with your findings, is that right, Mr. Wright?

[31] THE PROBATION OFFICER: Yes, sir.

MR. INGRAM: Your Honor, on the acceptance, while I acknowledge it leaves him in the same guideline range, I think I would like Your Honor to rule on that. I am asking for that, and I don't need to elaborate on the argument I made that it comes within the exceptions of the guidelines that talk about not contesting factual guilt, but contesting you are admitting conduct to the applicability of the statute, which I .say is what we were doing here. That is, by going to trial on the 924(c) count we're talking about acceptance of responsibility of the marijuana count, and he fully admitted.

THE COURT: I understand.

MR. INGRAM: The reason I'm pursuing that, even though it's the same guideline range, I have no idea whether your offense level affects you in any way within the Bureau of Prisons, but I have had things before come up that I did not contest because it didn't affect the guidelines, and clients call me and say we should have done this because it's keeping me from this program or whatever. So, because I do think under the guidelines he has accepted responsibility, I'm asking the Court to rule on that.

THE COURT: Mr. Levin, what do you say?

MR. LEVIN: Your Honor, I don't believe the defendant is entitled to acceptance of responsibility. I'm sorry, Your Honor.

[32] THE COURT: This is very hard to hear.

MR. LEVIN: Our position is that the defendant has not accepted responsibility.

THE COURT: Okay. I think I would have to agree with that. I think there has not been acceptance of responsibility, and this does not come within the exception.

That leaves us in the position, as I see it, that your client is in the offense level of eight, and a criminal history category of one, which on Count 1 calls for zero to six months, and Count 2, seven years consecutively, and two to-three years on Count 1 of supervised release, three to five-years on Count 2, up to $20,000 of fine, $250,000 in community restitution, $200, or $100 on each count, for the special assessment.

Do you agree, reserving your right to contest matters at other places, do you agree that's what we're dealing with here?

MR. INGRAM: I do, Your Honor.

THE COURT: Then I will adopt the presentence report prepared by Mr. Wright. Any evidence?

MR. INGRAM: No, Your Honor.

THE COURT: Mr. Ingram, as I hear from you on this, I want you to know that of all that took place in this case, the most egregious comment and thing that this Court deals with is a statement made by your client about what would happen to a police officer.

MR. INGRAM: I understand that. And, Your Honor, I can [33] only say that from having listened to the

entire tape, and having talked to my client, and heard his testimony, he was not saying, and if a police officer came in here I have the ability to kill him. He was saying, by way of example, here is how powerful these bullets are. He could have given an example of these things will go through a concrete block, but he was giving the example of probably the most commonly known deterrent to a bullet, that is a bullet proof vest; he is saying it would penetrate it, it will go all of the way through.

I don't think it's as malevolent as it sounds at first blush. I understand different people might hear that differently, but from having talked with him about that, the fact that he knows police officers, he is good friends with the one who came by periodically to check the pawn tickets, a female officer who he knew, I hope Your Honor will not, with what little discretion you have, sentence him to more than seven years. There is not much more you can do up there, but I would not consider that as egregiously as Your Honor apparently is.

THE COURT: I do feel like that is substantial. I think that people talk sometimes, but to put that – whatever you say about a specific group, just is very difficult. It could have been lawyers, judges, police officers, whoever. It just seems like a terribly egregious comment to make, it really does.

MR. INGRAM: He certainly regrets making it now.

THE COURT: I bet he does.

[34] MR. INGRAM: And, of course, judges and lawyers don't wear bullet proof vests, typically. I guess

he could have given an example of a U.S. soldier wearing a bullet proof vest, perhaps, but he was really talking about a bullet proof vest, not who was wearing it, and what it would do to the general group that wear the bullet proof vest.

But having said that, there is not really much, more that I want to say, because there is so little that the Court can do. We have already moved from a five year mandatory minimum to a seven year.

I think the gravamen of this case was the firearm. I think Mr. Levin said to me at one point that this drug case would not be here in federal court but for the fact that ATF was disturbed that marijuana sales were being sold out of a place where he had a firearm license. So, I think it is the firearm that is the gravamen here, and he is going to get seven years for that.

THE COURT: I'm sure that's true.

MR. INGRAM: And I would have asked Your Honor to do something a little unusual, but I have learned that I can't. I was going to ask Your Honor to give him probation on the zero to six month range for the drug offense, and have that probation run concurrently with his supervised release term on the seven year term of imprisonment.

I have since learned, and actually didn't notice in the [35] presentence report, but I have noticed since then by statute you can't do that. You can't impose probation on one offense when you're simultaneously getting an active term of imprisonment on another offense. But because you can't do that, and because if you could do that it

would not affect anything other than six months, it wouldn't affect the supervised release term if you gave him six months and gave him a supervised release term, I feel like Your Honor would have the supervised release term to run concurrently.

THE COURT: Yes.

MR. INGRAM: So, it's not going to affect that. So, I'm going to ask for something a little more unusual, and that is give him zero, or give him time served. He was arrested for – can't remember whether it was a day or two days, or whatever it was, but we just don't ever see a sentence at zero to six imposed at the low end of that without probation. But the guideline certainly contemplates you can do that. You don't have to impose probation. Here it would sort of be a useless and actually a legally impossible – it would be legally impossible to do that under the definition of the statute.

So, I'm asking Your Honor to give him either time served or zero on the drug offense, and then there would be no need to impose a supervised release term if you give him zero. If you impose time served, you can impose the term of supervised release to run concurrently with the term of supervised release [36] on the other offense. Seven years, I think, is what the attention should be focused on in this case, that is, the firearm.

And that's where the Government I think was coming from. And now that we have moved from a five year to a seven year on a term that has convinced me that if Congress wants to they can define night as day. I guess I have always heard two things you don't want to watch being made, sausage and law, and maybe this is one of

those examples for me. Maybe each would be less palatable if you observed the process. In any event, that's what I'm asking Your Honor to do.

THE COURT: Thank you, Mr. Ingram. Mr. Levin, I will hear from you, sir.

MR. LEVIN: Your Honor, briefly, if I may. I just want to make two points, which are points I'm sure the Court is well aware of, but I want to emphasize their importance.

Your Honor, the defendant, although he is facing one charge, and he faced one charge, the 924(c) count at trial, he; could have faced four counts, four 924(c) counts.

The testimony in the presentence report established that on four separate occasions he sold marijuana to Special Agent Boykin while brandishing a firearm. He has not been convicted of those four counts, instead the Government proceeded with just one count. His sentence would have been much longer, 20 years, I think, for the additional firearm counts. He is not facing [37] that. He is facing a mandatory minimum of seven years.

And I think that's an important point to make, Your Honor, that we're not here to see that the defendant goes to jail at the cost of his entire life, but firearm possession is serious; that possession with the sale of drugs is a serious matter, and he should be sentenced for both, for that sale of marijuana, and we would argue for the high end, six months, and then a mandatory minimum of seven years.

The fact that he made a comment about the penetrability of that bullet through a bullet proof vest, Your

Honor, he didn't say just a bullet proof vest, he said a police officer or cop. And when he went outside that pawn shop to sell marijuana to Agent Boykin, he carried his weapon. He moved his car around in a circular fashion so it was facing the street. The logical inference there is that he was protecting himself, carrying a weapon, making a drug sale. Who was he expecting? Perhaps it was law enforcement.

He put himself in a position where he could have used that weapon, and he had already evidenced what that weapon was capable of doing. That is a serious crime, Your Honor, and I will end with that. Thank you.

THE COURT: Thank you. It's very serious about the gun. I have no question about that.

I now give to you, Mr. Harris, an opportunity to be heard, if you wish to. You should know that you are not [38] required to say anything, and if you don't say anything it will not be held against you. However, this is serious to you, and if there is anything you want me to hear from you, in addition to what Mr. Ingram has already ably done for you, I will be glad to hear it.

THE DEFENDANT: No, sir.

THE COURT: You don't have anything?

THE DEFENDANT: No, sir.

THE COURT: All right, sir. Step up here, gentlemen, please.

(Bench conference on the record:)

THE COURT: It is my feeling that seven years is sufficient time to give this man, although, if under the

gun case it was more time, I might consider that, I don't know. But I think this is a gun case, and the seriousness of it is what he said.

I know your position on that, Bill, but you just don't mention those kind of things unless they have occurred to you, maybe not to do anything, but it's just something that he has got to wake up and realize you don't do. I think the question of brandishing, obviously, I would think, or I wouldn't rule that way, is proper, but I think it's a close case whether he brandished it or not. It bothers me to move from a legal possession of it to suddenly an enhancement for the same thing that was otherwise legal.

[39] As I expressed earlier, I think that's what the statute says, though, and I am comfortable that I'm right. So, if there is an appeal on that case, and I'm wrong on that, as I have been wrong before on other things, it wouldn't shock me, but I do want you to know that what I do on this case is to try to get a particular amount of time so that if he wins on the brandishing, as I see it, both would come back and I would reopen the first count again, because that's what I was looking for. I think I have authority to do that.

But I just tell you all ahead of time what my thoughts are. If I'm wrong, I just accept it that I'm wrong, whether I can do it or not. But I do think that seven years is sufficient to accomplish what needs to be accomplished in this case. So, if the judgment is fashioned, and you win it in the Court of Appeals, do not be surprised if I come back and say I can now resentence on both of these counts.

MR. INGRAM: I won't be surprised. I don't know what my position will be on that.

THE COURT: I'm not asking you for your position, I'm just telling you where I'm coming from.

MR. LEVIN: And I don't know if the Court is willing to do this, if I may suggest, it's a mandatory minimum of seven years. Obviously, if Mr. Ingram had prevailed it would have been a mandatory minimum of five years. Only the Court is willing to say that even if it had been a mandatory minimum of [40] five years, the Court would have sentenced the defendant to seven years, and that might obviate the need to have the case – if the Court's position is wrong, and would obviate the need for it to come back, because the Court's position would be that he would have gotten seven years.

THE COURT: I could have given him seven years?

MR. LEVIN: Sure, it's a mandatory minimum.

MR. INGRAM: No, it's a mandatory sentence.

THE COURT: It's a mandatory sentence.

MR. INGRAM: It's not shall be sentenced to five or more?

THE COURT: No, it's five. No, it says not less than five years.

MR. INGRAM: Okay.

THE COURT: Not less than five years.

MR. INGRAM: Well, Mr. milk toast is right.

THE COURT: Sorry about using that illustration.

I'm not sure of what I will do about that. I will simply say at this point that I believe the seven year sentence is appropriate, and I will go from there on what I will do if Bill wins it somewhere else.

MR. LEVIN: Thank you, Your Honor. May I retrieve my statute book?

THE COURT: You may have it back.

(Bench conference concluded).

THE COURT: This Court finds that for the circumstances [41] with which the Court has to work, that a sentence of seven years is appropriate, and that is in considering all of the aspects of this case, both charges, the one to which he has pled guilty and the one which he has not. So, the Court has tried to fashion a judgment in the case that will, in fact, recognize that, and the Court will be guided accordingly.

It is adjudged that on Count 1 the defendant shall be committed to the custody of the Bureau of Prisons for a period equal to the time that he has already served, which the court deems to be two days, whatever time it may be for the time served.

On Count 2, it is ordered that he shall be committed to the Bureau of Prisons for a period of seven years.

On Count 1 and Count 2, he shall be on supervised release for a period of three years on each count, which shall run concurrently with each other.

The Court has reviewed the imposition of a fine within guideline range and has determined that the defendant has the ability to pay a fine, and that he has been in business, and is skilled, and can continue his skills after learning additional skills while he is in custody. Therefore, a fine within the guideline range of $3,000 is imposed. There is a special assessment of $100 on each of the two counts, for a total of $200, which shall be paid.

Mr. Ingram?

[42] MR. INGRAM: Your Honor, we request that he just be allowed to pay that out of the Inmate Financial Responsibility program.

THE COURT: The $200 is due and payable immediately, and shall be paid at such times and in such amounts as the Bureau of Prisons, through the Inmate Financial Responsibility Act, may direct.

The conditions of supervised release are, one, that he shall abide by the standard conditions of supervised release; two, he shall cooperatively participate in any substance abuse treatment program, which may include drug testing, it may include in-patient or residential treatment, and if such treatment is directed, then during the time of that treatment he shall abstain from the use of alcoholic beverages, that is, if the treatment is directed by the probation office.

Three, the fine which is imposed here shall be paid beginning 30 days after his release from imprisonment, and he shall make then the payment of $85, and a similar

sum shall be due and payable each month, each calendar month thereafter, while he is on supervised release.

Mr. Wright, is there anything I haven't covered?

THE PROBATION OFFICER: No, sir, Your Honor.

THE COURT: Mr. Ingram, is there anything that you can think of that we have not covered?

MR. INGRAM: Not in terms of sentence, Your Honor. I do [43] request that Your Honor recommend placement as close to North Carolina as possible. And because Mr. Harris has been out on pretrial release without any incident up to this time, I'm asking that you allow him to self-report and give him a reporting date.

MR. LEVIN: Your Honor, I would ask that he be taken into custody today. There are several indictments that are pending apparently in state court. They haven't been able to serve them to the defendant, the state authorities. I feel like the information I have is he has been avoiding them.

THE COURT: Do I have any authority to let him stay out absent unusual circumstances since there is a conviction here of a drug case and the gun case? I'm not sure I have authority to let him stay out absent request of both parties, in the exceptional circumstances. You may look at it, 3143. Look at that.

MR. INGRAM: Your Honor, under 3143, it says that – it cross references 3142(f)(1), the detention statute, and that refers to a drug offense that is punishable by ten years or more, the maximum here is five years. So, if he were convicted of a drug offense, punishable by ten years

or more, you would have to take him into custody today, absent the circumstances outlined in the statute.

THE COURT: Do you agree with that?

MR. LEVIN: I do agree.

[44] THE COURT: Thank you for bringing that to my attention. Have there been any reports of failure to comply with the pretrial release?

MR. INGRAM: None that have been reported to me, Your Honor. He has been – he knows he has been told there are some warrants outstanding for him. He has spoken to me about that.

THE COURT: I'm not concerned about those right now.

MR. LEVIN: Your Honor, I'm getting information that he has not brought certain things to his probation officer in Charlotte. I'm in the process of finding out more details, but I have not spoken directly with the probation officer other than initially when the Court told me to contact him.

THE COURT: I don't remember doing that. I did?

MR. LEVIN: You did. You directed me to contact the, probation officer in Charlotte and let him know who I was, and if there were any incidences he should contact me. He has not contacted me to report any incidences, but apparently there has been a problem. I'm trying to find out.

THE COURT: Did you tell the probation office in Charlotte to notify you if there were any problems?

MR. LEVIN: I did, Your Honor.

THE COURT: All right. Then at this point that answers my question. Now, if there are problems, they may be brought to your attention, Mr. Levin, and I will amend and change where we are at this point. But at this point he is on pretrial release, [45] and has abided, so far as we know in this court, by the terms and conditions set forth. For that reason, the Court is going to give him a date of March the 30th, 2000, to report to the institution to which he is assigned.

Now, are you telling me that there are outstanding warrants for him now?

MR. LEVIN: There are, Your Honor.

THE COURT: What county?

MR. LEVIN: Stanly County.

THE COURT: Stanly?

MR. LEVIN: Yes, sir.

THE COURT: All right. Where does he live?

MR. INGRAM: In Anson County.

THE COURT: Anson County. What day do you want to meet Mr. Harris for those warrants?

MR. LEVIN: Your Honor, we have them now. We can serve them today.

THE COURT: All right. Serve them today while you're here. I was going to set a date that would be convenient for them, and convenient for Mr. Harris to be there, so that that can be a condition, but if they have

them with them, there's no reason they can't serve them now.

MR. LEVIN: We can do that today, Your Honor.

THE COURT: That will take care of that part of it.

MR. LEVIN: Your Honor, if we find out there has been a [46] problem –

THE COURT: You may bring it. I was going to mention that.

Mr. Ingram, I understand they have those warrants to serve on him at this time, and I see no reason why they can't do that.

Now, Mr. Harris, I'm about to release you under the same terms and conditions that you are already under release. So, those conditions remain in full force and effect. I have no idea, and as far as I know you have abided by every condition that you were required to abide by, or I think this Court would have been notified, but you are being released until that day of March the 30th, on the condition that the probation office does not bring anything to Mr. Levin's attention that might affect that, that is, the extent to which you have violated any of those conditions. If you have, then I reserve the right to bring you back in at that time.

I'm not trying to threaten you, I'm just trying to let you know that you are released at this point, and I hope that everything is fine until March the 30th. But be aware that any violation, either past violation or violation in the future, may cause a revocation of that release order. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Anything else, then, Mr. Ingram?

MR. INGRAM: No, Your Honor.

[47] THE COURT: Mr. Harris, you have an absolute right to appeal what has been done. If you're unable to afford an attorney to represent you, upon your motion the Court will appoint someone to represent you on that appeal. Listen to Mr. Ingram, who will give you his best advice on whether you have any successful chance for an appeal. Whatever Mr. Ingram may say, it is still your decision whether you wish to appeal, but if you're going to, you have got to get that notice in within ten days of the entry of the judgment or you would lose that right. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir. Good luck.

MR. LEVIN: Thank you.

THE COURT: Thank you, Mr. Levin. Let's recess until two o'clock.

(Sentencing hearing concluded.)

* * *

[48] CERTIFICATE

I, MARY JO BECK, CSR, RPR, RMR, United States District Court Reporter for the Middle District of North Carolina,

DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability; and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.

Date: 5-4-00 /s/ Mary Jo Beck
Mary Jo Beck, CSR, RPR, RMR
Official Court Reporter

United States District Court
Middle District of North Carolina

UNITED STATES OF AMERICA

v.

WILLIAM JOSEPH HARRIS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 1:99CR191-1
Defendant's Attorney: William C. Ingram
Assistant Federal Public Defender
(Filed February 28, 2000)

THE DEFENDANT:

[X] pleaded guilty to count 1s.

[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.

[X] was found guilty on count 2s after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1) & (b)(1)(D)	Distribute marijuana.	04/30/99	1s
18:924(c)(1)	Carry firearm during drug trafficking crime.	04/30/99	2s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[X] Count(s) 1-2 and 3s-4s are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN: 245-37-1204
Defendant's DOB: 07/07/77
Defendant's USM #: 20775-057
Defendant's Residence Address:

Highway 52 North
Post Office Box 164
Ansonville, N.C. 28007

Defendant's Mailing Address:
(if different from residence address)

February 17, 2000
Date of Imposition of Judgment

/s/ William L. Osteen
Signature of Judicial Officer

William L. Osteen, United States District Judge
Name & Title of Judicial Officer

February 23, 2000
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **seven (7) years.**

[Under Court 1s, defendant committed to the custody of Bureau of Prisons for a term of time served, and seven (7) years under Count 2s to run consecutively to the sentence imposed under Count 2s]

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender to the United States Marshal for this district.

[X] at 12:00 noon on 3/30/2000.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 pm on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

BY _____
DEPUTY US MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years.**

[Three (3) years under Count 1s, three (3) years under Count 2s to run concurrently with Count 1s].

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

[X] The defendant shall not posses a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing or inpatient/residential treatment, as directed by the probation officer. During the course of treatment, the defendant shall abstain from the use of alcoholic beverages.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals	**$200.00**	**$3,000.00**	**$**

[ ] If applicable, restitution amount ordered pursuant to plea agreement: $

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B, may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Payment
Totals:		$	$

** Findings for the total amount of losses are required under Chapters 109A, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payments of the total fine and other criminal monetary penalties shall be due as follows:

A [ ] in full immediately; or

B [X] $200.00 immediately, balance due (in accordance with C, D, E, or F); or

C [ ] not later than _____; or

D [ ] in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the US probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ *(equal, weekly, month, quarterly)* installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment; or

F [X] In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of the term of supervised release, the defendant shall make payments in equal, monthly installments of $85.00 to begin 30 days upon release from imprisonment and every 30 days thereafter until paid in full.

The court will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution (18 U.S.C. § 3664(k)).

The $200.00 special assessment shall be collected by the Federal Bureau of Prisons through the Inmate Financial Responsibility Program.

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District court for the Middle District of North Carolina, P. O. Box 2708, Greensboro, NC 27402, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except:

Guideline Range Determined by the Court:

Total Offense Level: 8

Criminal History Category: I

Imprisonment Range: 0 to 6 months on count 1s and count 2s seven (7) years, consecutively.

Supervised Release Range: 2 to 3 years on count 1s and 3 to 5 years on count 2s.

Fine Range: $2,000.00 to $20,000.00

[ ] fine waived or below the guideline range because of inability to pay.

Total Amount of restitution: $ n/a

[ ] Restitution is not ordered, because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title

18, restitution is not ordered, because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s);

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	:	No. 1:99CR191-1
vs.	:	
WILLIAM JOSEPH HARRIS	:	

NOTICE OF APPEAL

(Filed Feb. 18, 2000)

Comes now the defendant, by and through his undersigned counsel, and hereby gives notice of appeal to the Fourth Circuit Court of Appeals from the judgment and sentence imposed by the United States District Court for the Middle District of North Carolina on February 17, 2000.

Respectfully submitted, this 18th day of February, 2000.

/s/ William C. Ingram
WILLIAM C. INGRAM
First Assistant Federal Public Defender
North Carolina State Bar #9884
101 S. Elm Street, Suite 210
Greensboro, NC 27401
(336) 333-5455

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the below-mentioned attorney by mailing a copy of the same to the following address:

Mr. Steven H. Levin
Assistant United States Attorney
P. O. Box 1858
Greensboro, NC 27402

This, the 18th day of February, 2000.

/s/ William C. Ingram
WILLIAM C. INGRAM
First Assistant Federal
Public Defender

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 00-4154
WILLIAM JOSEPH HARRIS, *Defendant-Appellant.*	)	

Appeal from the United States District
Court for the Middle District of
North Carolina, at Durham.
William L. Osteen, District Judge.
(CR-99-191)

Argued: January 25, 2001
Decided: March 20, 2001

Before MICHAEL and MOTZ, Circuit Judges,
and Robert E. PAYNE, United States District Judge
for the Eastern District of Virginia,
sitting by designation.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Michael and Judge Payne joined.

COUNSEL

ARGUED: William Carlton Ingram, Jr., First Assistant Federal Public Defender, Greensboro, North Carolina, for

Appellant. Steven Hale Levin, Assistant United States Attorney, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Louis C. Allen III, Federal Public Defender, Greensboro, North Carolina, for Appellant. Walter C. Holton, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

After convicting William Harris of carrying a firearm in relation to drug trafficking, the district court found that he had "brandished" the firearm and sentenced him in accordance with 18 U.S.C. § 924(c)(1)(A)(ii) (Supp. IV 1998). Harris appeals, contending the court erred by increasing his sentence for brandishing the firearm, which he maintains constitutes an element of the offense that must be charged and proved beyond a reasonable doubt. Examination of the statutory language, structure, context, and history of § 924(c)(1)(A) leads us to conclude that "brandished" is a sentencing factor, not an element of the offense. Accordingly, we affirm.

I.

Harris owns a pawn shop in North Carolina. On April 29, 1999, an undercover law enforcement agent accompanied a confidential informant to Harris's shop. After talking with Harris, the agent purchased a small quantity of marijuana and returned the next day to purchase an additional 114 grams of marijuana.

During both transactions, Harris carried a 9mm Taurus handgun in an unconcealed hip holster. According to the agent's testimony, Harris, at one point, removed his firearm from its holster and explained that it "was an outlawed firearm because it had a high-capacity magazine," and further stated that his homemade bullets could pierce a police officer's armored jacket.

Harris was subsequently arrested and indicted on two counts of distribution of marijuana, 21 U.S.C. § 841(a)(1) & (b)(1)(D) (1994 & Supp. IV 1998), and two counts of carrying a firearm "in relation to" drug trafficking in violation of 18 U.S.C. § 924(c)(1)(A). The government dismissed one distribution count and one firearm count. Harris pled guilty to the other distribution count, but proceeded to a bench trial on the remaining § 924(c) count of carrying a firearm in relation to the April 30 drug trafficking incident.

At trial, the district court found that Harris carried the handgun in relation to a drug trafficking offense and convicted Harris of violating § 924(c)(1)(A). At Harris's sentencing hearing, the judge determined that he had "brandished" the gun within the meaning of § 924(c)(1)(A)(ii) & (c)(4) and consequently sentenced Harris to the mandatory minimum of seven years imprisonment prescribed by the statute. Harris now appeals.

II.

Section 924(c)(1)(A) provides in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking

> crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A). Harris principally contends that the "brandished" clause, 18 U.S.C. § 924(c)(1)(A)(ii), does not set forth a sentencing factor, but rather an element of the offense that must be specifically charged in the indictment and proved beyond a reasonable doubt at trial.

"Whether a fact is an offense element or a sentencing consideration is a matter of statutory interpretation." *United States v. Davis*, 184 F.3d 366, 368 (4th Cir. 1999).[1] Thus, we look to the statute's language, structure, context, and history in determining whether "brandished" is a sentencing factor. *See Castillo v. United States*, 120 S. Ct. 2090, 2092 (2000).

---

[1] Of course, after the Supreme Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348, "*any fact* that increases the penalty for a crime beyond the prescribed statutory maximum *must* be submitted to a jury, and proved beyond a reasonable doubt," *id.* at 2362-63 (emphasis added), thus obviating the need for "statutory interpretation" in those instances.

Most significant in determining whether the brandishing clause sets forth a sentencing factor or an element of the crime is the statutory language itself. Section 924(c)(1)(A)(ii) provides for no statutory maximum sentence. Instead the statute "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986). In other words, the sentencing court's finding that Harris "brandished" a firearm under subsection (ii) triggered a mandatory minimum sentence, but did not "increase[ ] the penalty . . . beyond the prescribed statutory maximum." *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2362-63 (2000).

In *McMillan*, the Supreme Court upheld Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982), which provided a mandatory minimum sentence of five years upon a finding that a defendant "visibly possessed a firearm" during the commission of certain felonies. *McMillan*, 477 U.S. at 80-81. The Court rejected the contention that the visible possession provision was an element of the offense because it did not "expose[ ] [the defendants] to greater or additional punishment." *Id.* at 88. The Court explained that the challenged statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty. . . . The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 87-88. Consequently, the

McMillan Court held that the mandatory minimum provision was simply a permissible restriction on the sentencing judge's discretion. *Id.* at 88. *See also Williams v. New York*, 337 U.S. 241, 246 (1949) ("[A] sentencing judge [can] exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within limits fixed by law.*") (emphasis added).

Because, like the statute at issue in *McMillan*, § 924(c)(1)(A) contains no maximum penalty, the government's failure to charge and prove brandishing beyond a reasonable doubt did not expose Harris to a punishment greater than he could have received had the sentencing judge not found that Harris "brandished" a firearm. Even without the "brandished" finding, Harris could have received a seven-year sentence. In fact, the sentencing judge noted that if we reversed his brandishing ruling, he might nonetheless exercise his discretion and apply a seven-year prison term upon re-sentencing.

Harris recognizes that the instant case involves a mandatory minimum provision, but nonetheless asserts that the Court's decision in *Apprendi* governs. He agrees that although *Apprendi* directly addressed an increase in a statutory maximum, it "also should apply to a statutory fact which increases the mandatory minimum sentence." Reply Brief at 2. But, by its own terms, *Apprendi* forecloses this argument; there, the Supreme Court explained:

> We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict – a limitation identified in the *McMillan* opinion itself.

Apprendi, 120 S. Ct. at 2361 n.13. In essence, Harris asks this court to do what the Supreme Court has explicitly refused to do. While the Supreme Court may certainly overrule *McMillan* in the future and apply *Apprendi* to any factor that increases the minimum sentence or "range" of punishment, rather than only the maximum punishment, *see Jones*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring) (opining that *McMillan* should be reconsidered), that is not our role. *See West v. Anne Arundel County*, 137 F.3d 752, 760 (4th Cir. 1998)

("Lower federal courts have repeatedly been warned about the impropriety of preemptively overturning Supreme Court precedent.").[2]

Indeed, this court and others have already held that *Apprendi* "only applies to sentences 'beyond the prescribed statutory maximum.' " *United States v. Pratt*, No. 99-4424, 2001 WL 101457 (4th Cir. Feb. 7, 2001). *See also United States v. Williams*, 238 F.3d 871, 877 (7th Cir. 2001)

---

[2] Harris may be correct that absent the district court's finding that he "brandished" a firearm, it is "unlikely," under the Sentencing Guidelines, that he would have received more than five years. *See* U.S.S.G. § 2K2.4(a)(2). But, that fact does not assist him because "the relevant 'maximum' under *Apprendi* is found on the face of the statute rather than in the Sentencing Guidelines." *United States v. Kinter*, 235 F.3d 192, 201 (4th Cir. 2000). Thus, although the finding may have increased his sentence under the Sentencing Guidelines, it still did not increase it beyond the "prescribed *statutory* maximum." *Apprendi*, 120 S. Ct. at 2363 (emphasis added).

("[I]f a defendant is sentenced under the statutory maximum, his sentence is not violative of *Apprendi*, regardless of a district court's consideration of a mandatory minimum sentence."); *United States v. Carlson*, 217 F.3d 986, 987 (8th Cir. 2000) (holding that § 924(c)(1)(A)(ii) is a mandatory minimum sentencing factor and not affected by *Apprendi*); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000) (same). *But cf. United States v. Bandy*, 2001 WL 69052, at *4-5 (6th Cir. Jan. 30, 2001) (relying on *Castillo* and finding that the "short-barreled shotgun" provision of 18 U.S.C. § 924(c)(1)(B)(i), which triggers a longer minimum sentence, is an element of the offense).

Moreover, since the application of § 924(c)(1)(A)(ii) did not expose Harris to a penalty greater than that already allowed under the statute, we are not faced with the concerns at issue in *Castillo*, or *Jones*, on which Harris principally relies. Unlike the instant case, both *Jones* and *Castillo* presented situations in which the finding of a certain statutory fact exposed the defendant to a term of imprisonment more severe than would have been permitted without the finding of that fact. *See Castillo*, 120 S. Ct. at 2092 (maximum sentence raised by twenty-five years if the crime was committed with a "machine gun"); *Jones*, 526 U.S. at 230-31 (sentence increased by ten years upon finding that the crime resulted in "serious bodily injury").

Furthermore, other factors also support the conclusion that "brandished" is not an offense element. First, the structure of the statute suggests this. Congress set the first paragraph of § 924(c)(1)(A) apart from the three subsections below, indicating that this first paragraph contains the elements of the crime – using or carrying a

firearm in relation to or possessing a firearm in furtherance of drug trafficking – while the subsections list sentencing factors limiting the judge's discretion when sentencing those convicted of the crime. *See Castillo*, 120 S. Ct. at 2093; *Carlson*, 217 F.3d at 987; *Pounds*, 230 F.3d at 1319. We acknowledge that § 924(c)(1)(A) is similar in structure to the carjacking statute at issue in *Jones*, but even the *Jones* Court recognized that a "principal paragraph" followed by "numbered subsections" has a "look" suggesting that the subsections are sentencing factors. *Jones*, 526 U.S. at 232.

Despite the statute's "look," the Court in *Jones* determined that the subsection at issue there stated a separate offense element; in part because it provided for "steeply higher penalties" and more importantly because Congress had previously treated "serious bodily injury" as a criminal offense element. *Id.* at 233, 235-36. The *Jones* Court cited no less than three federal statutes that "unmistakably identified serious bodily injury as an offense element." *Id.* at 235 (citing 10 U.S.C. § 928(b)(2); 18 U.S.C. § 37(a)(1); and 18 U.S.C. § 1091 (a)(2)). Similarly, the statute at issue in *Castillo* provided steeply higher penalties and involved a factor that Congress had traditionally treated as a separate element of a criminal offense. *Castillo*, 120 S. Ct. at 2094, 2096. And again, the Supreme Court cited statutes in which Congress treated "machinegun" as a substantive element of a criminal offense. *Id.* at 2094.

In contrast, Harris has cited no federal statute in which Congress has treated "brandished" as a separate

offense or element of an offense.[3] Nor have we located any such federal statute. Indeed, "brandish" seldom appears in the United States Code, but instead arises with great frequency in the United States Sentencing Guidelines as the basis for a sentence enhancement. *See, e.g.*, U.S.S.G. § 2A2.2(b)(2)(c), § 2B3.1(b)(2)(C), § 2E2.1 (b)(1)(c), § 2L1.1(b)(4)(c).[4]

Although inconclusive, the legislative history of the 1998 amendment to § 924(c) also hints that Congress has traditionally viewed "brandished" not as an integral element of the offense, but more as a "manner in which a basic crime was carried out," thus having the characteristic of a "[t]raditional sentencing factor[ ]." *Castillo*, 120

---

[3] Harris does cite W. Va. Code § 61-7-11 (West 2000) and VI. Code Ann. Tit. 14 § 621 (1999), in which brandishing a weapon is an element of a crime. Brief of Appellant at 21. Although the Supreme Court in *Jones* acknowledged that "[s]tate practice bolster[ed]" the Court's holding, it also recognized that state practice is not "direct authority for reading the federal carjacking statute." *Jones*, 526 U.S. at 236-37. Without evidence that Congress has treated brandishing as an offense element in other federal statutes, we do not find the fact that a state and a territory have done so to be sufficient evidence from which to glean congressional intent in this case.

[4] That "brandished" appears in the Sentencing Guidelines is not by itself proof that it is a sentencing factor. "Serious bodily injury," which the *Jones* Court found to be an element of the carjacking offense, often appears in the Sentencing Guidelines as the basis for a sentencing enhancement. *See, e.g.*, U.S.S.G. § 2A4.1(b)(2)(B) (increasing kidnaping sentence by two levels if victim sustained "serious bodily injury"). However, the fact that "brandish" is a frequent sentencing enhancement coupled with the fact that we have found no federal statute treating it as an offense element, suggests that Congress has not traditionally treated it as such.

S. Ct. at 2094. The original proposed amendment, as passed by the House, read:

> A person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States –
>
> (A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;
>
> (B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or
>
> (C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years. . . .

H.R. 424, 105th Cong. (2d Sess. 1998); 144 Cong. Rec. H530-31, H535 (daily ed. Feb. 24, 1998) (passing the bill in the House).

In the final bill, however, Congress decided not to include brandishing or discharging as actus reus elements of the offenses proscribed in the initial principal paragraph.[5] While we are careful not to read too much

---

[5] The previous version of § 924(c)(1) applied to only one who "uses" and "carries" a firearm in relation to a drug trafficking or violent crime. There was no provision for possessing. The Supreme Court, in *Bailey v. United States*, 516 U.S. 137 (1995), held that "use" meant active use and mere

into this alteration, the fact that "brandished" and "discharged" remained in subordinate subsections, while "possessed" ascended to accompany the main criminal acts from the previous bill, cannot be completely overlooked. In fact, the Supreme Court in *Castillo* recognized that Congress's 1998 amendment of § 924(c), separating certain statutory factors into numbered subsections, "suggest[ed] a contrary interpretation" from the one it ultimately adopted. *Castillo*, 120 S. Ct. at 2093. However, the Court refused to consider these 1998 changes, because it was addressing the 1993 version of § 924(c). *Id.* We, however, are interpreting § 924(c) as amended in 1998 and so must take into account those changes acknowledged but not considered in *Castillo*.

The *Castillo* decision is also helpful in that the Court specifically suggested that "brandished" is a sentencing factor, stating that "[t]raditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out (e.g., that the defendant abused a position of trust or *brandished a gun*)." *Castillo*, 120 S. Ct. at 2094 (emphasis added). The fact that the Supreme Court used "brandished a gun" as an example of a sentencing factor gives us an additional measure of confidence that our decision falls within the Supreme Court's recent jurisprudence on the issue.

---

possession was insufficient for conviction. *Id.* at 143-44. In response, Congress sought to amend § 924(c) to criminalize possession in furtherance of a drug trafficking crime. *See* 144 Cong. Rec. S12670-71 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine); 144 Cong. Rec. H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum).

Finally, § 924(c)(1)(A) also differs from the statutes at issue in *Jones* and *Castillo* in that the severity of the separate harms in those statutes were punctuated by the "steeply higher penalties" assessed when the elements at issue were found. *Jones*, 526 U.S. at 2333 (noting that the maximum carjacking penalties were increased by ten years for serious bodily harm); *Castillo*, 120 S.Ct. at 2095 (noting that the maximum penalty for carrying a firearm increased from five to thirty years when the firearm was a machinegun). In comparison, the mandatory minimum for brandishing a firearm as opposed to simply carrying a firearm increases by only two years. At oral argument, Harris maintained that the two-year enhancement increased the penalty by forty percent, and is thus a "steeply higher penalty." This argument is misleading because Harris's *available* penalty did not increase at all upon the "brandished" finding – he could have received seven years even without that finding. In addition, the claimed forty percent increase is less than the 500 percent increase in *Castillo* or even the sixty-six percent increase in *Jones*. And regardless of the percentages, a two-year sentence enhancement is not as "steep" as an additional ten or twenty-five years in prison.[6]

For the foregoing reasons, we hold that the "brandished" clause of 18 U.S.C. § 924(c)(1)(A)(ii) sets forth a sentencing factor that need not be charged in the indictment. Harris's evidentiary arguments are totally without

---

[6] Indeed, percentages can be misleading; for instance, a penalty enhancement from one to three days imprisonment would be a 200 percent increase, but we would be hard-pressed to call such an increase "steep."

merit.[7] We, therefore, affirm Harris's conviction and sentence.

AFFIRMED

---

[7] Harris asserts that the government offered insufficient evidence to prove that he carried his gun "in relation to" drug trafficking. On the facts here, a reasonable finder of fact could certainly conclude that he carried his gun in relation to his drug sales. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Harris also claims that the evidence was insufficient to support the sentencing court's finding that he "brandished" his gun. Given the evidence that Harris carried and displayed the firearm in the pawn shop, carried it to the drug sales, explained that it had a high-capacity magazine and could pierce an officer's armored jacket, and that it was visible in his holster during the drug sales, we can hardly conclude that the district court clearly erred in finding that he "brandished" it as defined by 18 U.S.C. § 924(c)(4).

Office of the Clerk

Supreme Court of the United States
Washington, D.C. 20543-0001

December 10, 2001

William C. Ingram
First Asst. Federal Public Defender
101 South Elm Street, Suite 210
Greensboro, North Carolina 27401

Re: 00-10666 – Harris, William J. v. United States

Dear Mr. Ingram:

The Court today entered the following order in the above case:

> "The motion of petition for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the following question: Given that a finding of "brandishing," as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?"

* * *

If I may be of any assistance, please contact me.

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ Denise J. McNerney
Denise J. McNerney
Merits Cases Clerk
(202) 479-3032

Enclosures

---

(6)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 00-10666

In The

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONER

WILLIAM C. INGRAM
First Assistant Federal Public Defender
Counsel of Record
LOUIS C. ALLEN, III
Federal Public Defender
ELIZABETH A. FLAGG
Research & Writing Attorney
FEDERAL PUBLIC DEFENDER OFFICE
Suite 210
101 South Elm Street
Greensboro, North Carolina 27401
(336) 333-5455

JEFFREY T. GREEN
JACQUELINE GERSON COOPER
ALEXANDRA R. GELBER
ERIC A. SHUMSKY
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

60 pp

QUESTION PRESENTED

Given that a finding of "brandishing," as used in 18 U.S.C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE STATUTE REQUIRES THE PROSECUTION TO CHARGE BRANDISHING IN THE INDICTMENT AND PROVE IT TO A JURY BEYOND A REASONABLE DOUBT 8

A. This Court In *Jones* Has Already Held That An Identical Statute Sets Forth Elements Of The Offense, Not Sentencing Factors 8

B. The Legislative History Of The 1998 Amendment To § 924(c) Confirms That Congress Intended Brandishing A Firearm To Be An Element Of The Offense 15

1. Congress amended § 924(c) in direct response to this Court's opinion in *Bailey v. United States* 16

2. The congressional record reflects Congress' intent to treat brandishing and discharging as offense elements 20

TABLE OF CONTENTS – Continued

Page

C. Any Ambiguity In The Meaning Of § 924(c)(1)(A) Must Be Read In Petitioner's Favor 23

1. The Rule of Lenity 24

2. The Doctrine of Constitutional Avoidance 25

II. THE CONSTITUTION REQUIRES THAT BRANDISHING A FIREARM BE TREATED AS AN OFFENSE ELEMENT UNDER § 924(c)(1)(A) 27

A. Any Fact That Alters Or Increases The Prescribed Range Of Penalties To Which A Defendant Is Exposed Must Be Charged In The Indictment, Submitted To A Jury, And Proved Beyond A Reasonable Doubt 27

1. The concerns underlying the reasonable doubt requirement apply with equal force to findings that increase the statutory maximum sentence and to those that increase the mandatory minimum sentence 30

2. Historically, courts treated all factors that altered a defendant's punishment as elements of the offense 35

3. Distinguishing between factors that increase statutory maximum sentences and mandatory minimum sentences would allow legislatures to circumvent *Apprendi* 37

TABLE OF CONTENTS – Continued

Page

B. The Court's Decision In *McMillan* Has Been Undermined By Developments In The Law And A New Understanding Of The Historical Treatment Of Offense Elements 40

C. Even If *McMillan* Remains Good Law, The Court Should Reverse Because The Amendments To § 924(c)(1) Raise The Spector Of Congress Restructuring Crimes To Evade The Requirements Of *Winship* 45

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES

Albernaz v. United States, 450 U.S. 333 (1981) 24

Almendarez-Torres v. United States, 523 U.S. 224 (1998) ..... *passim*

American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) 16

Apprendi v. United States, 530 U.S. 466 (2000) .... *passim*

Bailey v. United States, 516 U.S. 137 (1995) 15, 16, 17, 18, 19

Brightwell v. State, 41 Ga. 482, 1871 WL 2314 (1871) 36

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932), *overruled on other grounds, Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938) 41, 43

Castillo v. United States, 530 U.S. 120 (2000) 2, 12, 14, 23, 24, 26

Commonwealth v. Smith, 1 Mass. 245, 1804 WL 709 (1804) 36

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 16

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 9

Garcia v. State, 19 Tex. App. 389, 1885 WL 6922 (1885) 36

Hobbs v. State, 44 Tex. 353, 1875 WL 7696 (1875)....34, 35

Hodel v. Virginia Surface & Mining & Reclamation Ass'n, 452 U.S. 264 (1981)..... 18

Hope v. Commonwealth, 50 Mass. 134, 1845 WL 4043 (1845) 36

TABLE OF AUTHORITIES – Continued

Page

Johnson v. State, 55 N.Y. 512, 1874 WL 11015 (1874) 36

Jones v. United States, 526 U.S. 227 (1999)..... *passim*

Lacy v. State, 15 Wis. 13, 1862 WL 951 (1862)..... 36

Leland v. Oregon, 343 U.S. 790 (1952) 39

McMillan v. Pennsylvania, 477 U.S. 79 (1986)..... *passim*

Monge v. California, 524 U.S. 721 (1998)..... 43

Mullaney v. Wilbur, 421 U.S. 684 (1975) 31, 43, 45, 46, 47

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 41, 44

Patterson v. New York, 432 U.S. 197 (1977) 28, 39, 43

Payne v. Tennessee, 501 U.S. 808 (1991)..... 42

Planned Parenthood v. Casey, 505 U.S. 833 (1992) ..41, 43

Ritchey v. State, 7 Blackf. 168, 1844 WL 2999 (Ind. 1844)..... 36

Searcy v. State, 1 Tex. App. 440, 1876 WL 9086 (1876) 34

Staples v. United States, 511 U.S. 600 (1994)..... 24

United States ex rel. Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366 (1909)..... 25

United States v. Featherson, 949 F.2d 770 (5th Cir. 1991)..... 17

United States v. Gatewood, 230 F.3d 186 (6th Cir. 2000), *cert. denied*, 2002 WL 32559 (U.S. Jan. 14, 2002) (No. 01-7283)..... 24

TABLE OF AUTHORITIES – Continued

Page

United States v. Granderson, 511 U.S. 39 (1994) 24

United States v. Hager, 969 F.2d 883 (10th Cir. 1992) 17

United States v. Long, 905 F.2d 1572 (D.C. Cir. 1990) 17

United States v. Meggett, 875 F.2d 24 (2d Cir. 1989) 17

United States v. Norris, 143 F. Supp. 2d 243 (E.D.N.Y. 2001) 42

United States v. Paz, 927 F.2d 176 (4th Cir. 1991)..... 17

United States v. Plummer, 964 F.2d 1251 (1st Cir. 1992)..... 17

United States v. Poole, 878 F.2d 1389 (11th Cir. 1989) 17

United States v. Reese, 92 U.S. 214 (1875) 36

United States v. Smith, 223 F.3d 554 (7th Cir. 2000), *petition for cert. filed*, No. 00-7070 (U.S. Nov. 14, 2000)..... 32

United States v. Torres-Mediana, 935 F.2d 1047 (9th Cir. 1991) 17

Walton v. Arizona, 497 U.S. 639 (1990) 43

In re Winship, 397 U.S. 358 (1970) 27, 43, 45, 46, 47

CONSTITUTION AND STATUTES

U.S. Const. amend. V..... *passim*

U.S. Const. amend. VI ..... *passim*

2 U.S.C. § 167d..... 13

18 U.S.C. § 922(q)(3)(A)..... 13

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 924(c) ..... *passim*

18 U.S.C. § 924(c)(1) (1994) 15, 17, 45

18 U.S.C. § 924(c)(1)(A)..... *passim*

18 U.S.C. § 924(c)(4)..... 5

18 U.S.C. § 2119..... 6, 11, 13

18 U.S.C. § 2119(2) (1998 ed. Supp. V.)..... 10

18 U.S.C. § 3559(c)(2)(A)..... 13

21 U.S.C. § 841(a)(1) & (b)(1)(D) 4

21 U.S.C. § 848..... 32

28 U.S.C. § 1254..... 1

40 U.S.C. § 13j 13

40 U.S.C. § 193f(a)(1)(B) 13

LEGISLATIVE HISTORY

S. 1612, 104th Cong. (1996) 17

S. 1945, 104th Cong. (1996) 17

H.R. 125 104th Cong. (1996) 17, 21

S. 3, 105th Cong. (1997) 17

S. 15, 105th Cong. (1997) 17

S. 43, 105th Cong. (1997) 17, 18

S. 362, 105th Cong. (1997) 17, 18

S. 602, 105th Cong. (1997) 17

S. 191, 105th Cong. (1997) 17, 20

TABLE OF AUTHORITIES – Continued

Page

S. 2484, 105th Cong. (1998) 17

H.R. 424, 105th Cong. (1997) 17

H.R. 2340, 105th Cong. (1997) 17

H.R. 3155, 105th Cong. (1998) 17

A Bill to Throttle Criminal Use of Guns: Hearing Before the Senate Comm. on the Judiciary, 105th Cong. (1997) 19

Examining the Bailey Decision's Effect on Certain Prosecutions of Violent and Drug Trafficking Crimes: Hearing Before the Senate Comm. on the Judiciary, 104th Cong. (1996) 20

H.R. Rep. No. 105-344 (1997) 19, 20

H.R. Rep. No. 105-845 (1999) 22, 23

142 Cong. Rec. E471-01 (daily ed. Mar. 22, 1996) 21

142 Cong. Rec. H2674-01 (daily ed. Mar. 22, 1996) 21

142 Cong. Rec. H2705-02 (daily ed. Mar. 22, 1996) 21

143 Cong. Rec. E80-03 (daily ed. Jan. 9, 1997) 19

143 Cong. Rec. S379-01 (daily ed. Jan. 12, 1997) 18

143 Cong. Rec. S1659-03 (daily ed. Feb. 26, 1997) 19

144 Cong. Rec. H530-02 (daily ed. Feb. 24, 1998) ...19, 22

144 Cong. Rec. H10329-01 (daily ed. Oct. 9, 1998)...19, 23

144 Cong. Rec. S12670-02 (daily ed. Oct. 16, 1998)..20, 22

TABLE OF AUTHORITIES – Continued

Page

SCHOLARLY AUTHORITIES

1 J. Bishop, *Law of Criminal Procedure* (2d ed. 1872) 37

B. Cardozo, *The Nature of the Judicial Process* (1921) 43

Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 Am. Crim. L. Rev. 255 (2001) 38

Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467 (2001) 39

Kyron Huigens, *Rethinking the Penalty Phase*, 32 Ariz. St. L.J. 1195 (2000) 39

OTHER AUTHORITIES

U.S. Sentencing Guidelines Manual (2001) 34

U.S. Sentencing Comm'n, *Federal Sentencing Statistics for Fiscal Year 2000* (2001) 34, 40

OPINIONS BELOW

The opinion of the court of appeals is reported at 243 F.3d 806. Pet. App. B. The district court's February 28, 2000, judgment is unreported. Pet. App. A.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals was entered on March 20, 2001. The Court granted the Petition for Writ of Certiorari on December 10, 2001. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law. . . .

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation. . . .

18 U.S.C. § 924(c)(1)(A)

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

The issue in this case is whether the district court properly increased Petitioner's mandatory minimum sentence from five years to seven years based upon a finding, made only at sentencing and by a slim preponderance of the evidence, that Petitioner had "brandished" his weapon in violation of 18 U.S.C. § 924(c)(1)(A)(ii). This critical fact was not charged in the indictment and not proved at trial beyond a reasonable doubt. The Court's recent holdings in *Apprendi v. United States*, 530 U.S. 466 (2000), *Jones v. United States*, 526 U.S. 227 (1999) and *Castillo v. United States*, 530 U.S. 120 (2000) demonstrate plainly that both the statute and the Constitution require more. Petitioner was entitled to proper

notice in the indictment and the opportunity to challenge, in the crucible of an adversarial trial, the prosecution's evidence that he had brandished a weapon with an intent to intimidate, prior to being sentenced to an immutable term of seven years' duration.

Background

Petitioner owned and operated a pawn shop in Albemarle, North Carolina. (JA 74). Like most pawn shop owners, Petitioner regularly – and lawfully – wore an unconcealed gun during business hours, but took it off every night before leaving the shop. (JA 78-82, 163). On the afternoon of April 29, 1999, an undercover agent entered the pawn shop with Rodney Deaton, a confidential informant who is Petitioner's half brother, to purchase marijuana from Petitioner. (JA 38, 41). The three men spent thirty minutes in casual conversation before negotiating the sale of one ounce of marijuana. (JA 46-47). After the sale was complete, the informant, Deaton, noticed the gun in Petitioner's hip holster and asked about it. (JA 49). After further inquiries from both Deaton and the agent, Petitioner removed the gun from his holster and explained that it had a high-capacity magazine and used bullets that could pierce a police officer's armored jacket. (JA 49-50). The three men examined the gun, then Deaton and the agent left the shop.

The agent returned by himself on April 30 and May 6 to purchase more marijuana. (JA 55, 58). On each occasion, the shop was open for business, and Petitioner was wearing the gun in his holster. (JA 55, 59). Neither man mentioned the gun again, and Petitioner never removed

it from his holster. (JA 55-58). The agent purchased four ounces of marijuana on April 30, and three-and-a-half ounces on May 6. (JA 56-57). He also purchased one gram of what was believed to be opium and two diazepam tablets on the latter date. (JA 64)

Petitioner was later arrested and charged with two counts of distribution of marijuana under 21 U.S.C. §§ 841(a)(1) & (b)(1)(D) and two counts of "carry[ing]" a firearm "in relation to" a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A). (JA 4-6). The indictment did not charge that Petitioner had brandished the gun, nor did it charge him with any crime pertaining to the events of April 29. Prior to trial, the prosecution dismissed one distribution count and one firearm count, and Petitioner pleaded guilty to the remaining distribution charge. (JA 9-23). He disputed the remaining firearm count, however, and after waiving his right to a jury, he was tried before a judge. (JA 23-25). Despite only meager evidence that Petitioner had carried a firearm "in relation to" a drug trafficking crime, the judge found him guilty under § 924(c)(1)(A). (JA 163-64).

The presentence report recommended that Petitioner be given zero to six months in prison for the distribution charge. (PSR 11). The report also recommended that he be sentenced to a mandatory minimum sentence of seven years on the firearm count. *Id.* Although the mandatory minimum sentence for carrying a firearm during a drug-related crime under § 924(c)(1)(A) is five years, the report relied on § 924(c)(1)(A)(ii), which increases the mandatory minimum sentence to seven years when the firearm is brandished. *Id.* The report did not explain why Petitioner should be subject to this higher sentence.

Petitioner disputed the report's recommendations. He argued that brandishing is an element of a separate offense under § 924(c)(1)(A) and therefore must be charged in the indictment and proved beyond a reasonable doubt. (JA 198-205, 222). The judge disagreed. (JA 226, 233, 244-47). Petitioner also argued that he had not brandished a firearm during the drug sale because he had not displayed it "in order to intimidate" another person.[1] (JA 219-22). Repeatedly acknowledging that it was a "close case" and that "the only thing that happened here is he had [the gun] during the drug transaction," the judge nonetheless found by a preponderance of the evidence that Petitioner had brandished a firearm under § 924(c)(1)(A)(ii). (JA 232, 244-47). Although the judge initially indicated that he would not consider Petitioner's comments regarding the gun's ammunition because they were made in response to inquiries from Deaton and the undercover agent, the judge then cited that conversation as primary support for his decision. (JA 217, 240). He sentenced Petitioner to two days time served on the distribution count and seven years on the firearm count. (JA 247).

On appeal, Petitioner renewed his arguments that he had not brandished a firearm and that brandishing is an element of a separate offense that must be charged in the indictment and proved beyond a reasonable doubt. The

---

[1] Under 18 U.S.C. § 924(c)(4), " 'brandish' means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person."

Fourth Circuit rejected both claims. *See* Pet. App. B. The court of appeals ruled that brandishing is not an element of a separate offense, but merely a penalty enhancement. *Id.* at 10. In reaching this decision, the Fourth Circuit relied on the structure of § 924(c)(1)(A) and the legislative history of its enactment. *Id.* at 7-10. The court also relied on this Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Pet. App. B at 4-6. The court of appeals affirmed on the basis that the trial judge had not clearly erred in finding that Petitioner brandished the gun. *Id.* at 10 n.7.

SUMMARY OF ARGUMENT

This case is governed by *Jones*. The statute at issue here, 18 U.S.C. § 924(c)(1)(A), is identical in its structure to the statute that was at issue in that case, 18 U.S.C. § 2119. In *Jones*, the Court held that the particular facts specified in the separate subsections of the statute (*e.g.*, causing serious bodily injury) had to be pled in the indictment and proved to a jury beyond a reasonable doubt, consistent with the defendant's constitutional due process and jury trial rights. Here, not only is the structure of § 924(c)(1)(A) indistinguishable from that in *Jones*, but the legislative history even more plainly indicates that Congress intended to create separate criminal acts with increasingly severe punishments, rather than mere sentencing factors. In addition, both the federal government and the States have traditionally treated both brandishing and discharging as offense elements. Should the Court be unpersuaded by this evidence and conclude that

the statute is ambiguous, the rule of lenity and the doctrine of constitutional avoidance mandate that the Court resolve this ambiguity in Petitioner's favor.

Even if the Court disagrees with Petitioner's statutory analysis, the Constitution requires that brandishing and discharging be treated as offense elements. In *Apprendi v. United States*, 530 U.S. 466, 490 (2000), the Court held that " 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' " must be submitted to a jury and established by proof beyond a reasonable doubt. Although *Apprendi* involved an increase beyond the statutory maximum sentence and this case involves an increase in the mandatory minimum sentence, the protections of the Fifth and Sixth Amendments cannot turn on this distinction. When a judge makes a finding that increases the mandatory minimum sentence, the defendant's loss of liberty and the stigma of the conviction are heightened in the same fashion as when a judicial finding increases the statutory maximum sentence. Moreover, courts have not traditionally distinguished between factors that increase the statutory maximum sentence and those that increase the mandatory minimum sentence. Lastly, if the Court does distinguish between increases in statutory maximum sentences and increases in mandatory minimum sentences, it will create a vast loophole by which legislatures could evade the requirements of the Fifth and Sixth Amendments simply by raising the statutory maximum sentences for certain crimes to life in prison and then creating a range of punishments based on various factors.

ARGUMENT

I. THE STATUTE REQUIRES THE PROSECUTION TO CHARGE BRANDISHING IN THE INDICTMENT AND PROVE IT TO A JURY BEYOND A REASONABLE DOUBT.

Title 18 of the United States Code, section 924(c)(1)(A), imposes increasingly steep penalties for increasingly severe acts. Whether a defendant receives one sentence or another twice as severe depends on the rigorous proof at trial of all essential elements of the offense.[2]

Any other interpretation is contrary both to the language and structure of the statute, the traditional treatment of such provisions, the intent of Congress, and constitutional principles.

A. This Court In *Jones* Has Already Held That An Identical Statute Sets Forth Elements Of The Offense, Not Sentencing Factors.

Section 924(c)(1)(A) provides as follows:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in

[2] The constitutional issue in this case – that elements of the offense must be charged in the indictment and proved to a jury beyond a reasonable doubt – is not altered by the fact that Petitioner elected to waive his Sixth Amendment right to a jury trial and instead proceeded with a bench trial. The key fact is that brandishing was never alleged and never proved beyond a reasonable doubt.

> furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.[3]

The Fourth Circuit interpreted the division between the first paragraph and the subsections to be a dividing line between offense elements and sentencing factors. As a result, it concluded that using, carrying, and possessing are the only offense elements, while brandishing and discharging are "sentencing factors limiting the judge's discretion when sentencing those convicted of the crime."

[3] Although only the brandish provision of § 924(c)(1)(A)(ii) is directly at issue in this case, the discharge provision of § 924(c)(1)(A)(iii) must necessarily receive the same construction. The two provisions are listed in parallel subsections of § 924(c)(1)(A) and differ only in the type of conduct they describe and the punishment they carry. As a result, if one qualifies as an offense element, the other must as well. *See Jones*, 526 U.S. at 233 (treating parallel subsections as equivalent for purposes of determining whether the statute sets forth offense elements or sentencing factors); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts should read statutory provisions "in their context and with a view to their place in the overall statutory scheme" so as to "interpret the statute as a symmetrical and coherent regulatory scheme" (internal citations omitted)).

Pet. App. B at 7. This structural analysis has already been rejected by the Court in *Jones v. United States*, 526 U.S. 227 (1999), with regard to a nearly identical statute.

In *Jones*, the defendant was convicted of carjacking under 18 U.S.C. § 2119(2) (1988 ed., Supp. V.), which reads:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The indictment did not charge that serious bodily injury had resulted, and the issue was never put to proof before the jury. Nonetheless, the judge sentenced the defendant to twenty-five years pursuant to subsection (2). This Court reversed the defendant's sentence, holding that the "serious bodily injury" provision of § 2119(2) is an element of the underlying offense rather than a sentencing factor, and thus, must be charged in the indictment and proved beyond a reasonable doubt. *Jones*, 526 U.S. at 252.

Although "at first glance [§ 2119] has a look to it suggesting that the numbered subsections are only sentencing provisions," *id.* at 232, the Court rejected this "superficial impression" for several reasons. First, it noted that subsections (2) and (3) "not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (*e.g.*, force and violence, intimidation)." *Id.* at 233. Second, the Court pointed out that the first paragraph, standing by itself, "would merely describe some very obnoxious behavior, leaving any reader assuming that it must be a crime, but never being actually told that it is." *Id.* It is the numbered subsections that "complete the thought" and make clear that what is being described is a crime. *Id.* Third, the Court rejected the government's claim that the word "shall" divided the "offense-defining provisions from those that specify sentences." *Id.* Although the word "shall" often serves this function in federal statutes, the Court explained, "it hardly does so invariably." *Id.* at 234. And given that the clause in § 2119 before the word "shall" was "grammatically incomplete," the Court declined to give any significance to the placement of "shall" in the statute. *Id.*

The Court's analysis of the text in *Jones* applies with equal force here. First, the numbered subsections of § 924(c)(1)(A) provide for steeply higher penalties conditioned on further facts (brandishing and discharging a firearm) that seem just as important as the facts described in the first paragraph (using, carrying, and possessing a firearm). Indeed, the seven-year sentence for brandishing a firearm is forty percent longer than the lower five-year

sentence for using, carrying, or possessing, and the ten-year sentence for discharging fully doubles that sentence. *See Castillo v. United States*, 120 U.S. 120, 131 (2000) (noting that when the presence or absence of a particular fact dramatically affects the length and the severity of the sentence, it is appropriate to "assume a preference for traditional jury determination of so important a factual matter."). Second, the first paragraph of the statute describes obnoxious behavior, but does not state explicitly that this behavior is a crime. It is only the numbered subsections (i), (ii), and (iii) that "complete the thought" and make clear that what is being described is a punishable offense. Third, the placement of the word "shall" between the first paragraph and the numbered subsections has no significance given that the first paragraph is "grammatically incomplete" without the subsections that follow. Thus, as in *Jones*, the text of the statute demonstrates that the statute sets forth offense elements rather than sentencing factors.[4]

The Court in *Jones* buttressed its inferences from the statute's structure by looking at how the States and Congress had traditionally treated the infliction of "serious bodily injury." The Court found that, although Congress had occasionally treated the type of injury caused as a sentencing factor, it had "unmistakably identified serious bodily injury as an offense element in any number of

[4] The Court's statutory analysis in *Jones* did not turn on the fact that a finding of serious bodily injury increased the penalty beyond the statutory maximum sentence. Therefore, it makes no difference that brandishing and discharging, if proved, result in an increase in the statutory minimum sentence. The two statutes are structurally the same.

statutes," including the federal robbery statutes upon which § 2119 was modeled. 526 U.S. at 235-36. The Court also found that "[m]any States use causation of serious bodily injury or harm as an element defining a distinct offense of aggravated robbery." *Id.* at 236. This evidence, the Court held, strongly suggested that Congress intended for "serious bodily injury" to be an offense element. *Id.* at 237.

In this case, there is even more powerful evidence that the factors at issue have traditionally been treated as offense elements by Congress and the States. In at least four federal statutes, discharging a firearm is an offense element that must be charged in the indictment and proved beyond a reasonable doubt. *See* 40 U.S.C. § 193f(a)(1)(B) (criminalizing the discharge of a firearm on Capitol grounds); *id.* § 13j (criminalizing the discharge of a firearm in the Supreme Court building); 2 U.S.C. § 167d (criminalizing the discharge of a firearm in the Library of Congress); 18 U.S.C. § 922(q)(3)(a) (criminalizing the discharge of a firearm in a school zone). *See* Pet. App. D. Petitioner is not aware of any federal statute that treats discharging a firearm as a mere sentencing factor.[5] As for the States, nearly every one has at least one statute

[5] Certain definitions within federal criminal statutes show that Congress has traditionally treated brandishing as an element of the offense. For example, 18 U.S.C. § 3559(c)(2)(A) defines the term "assault with intent to commit rape" as "an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person." This indicates that Congress considered "brandishing" a weapon to be an element of an offense separate from "using" a weapon.

that criminalizes the discharge of a firearm, while many have more than one such statute. In all, Petitioner has identified 210 state statutes in which discharging a firearm is an explicit element of a criminal offense. *See* Pet. App. E. In addition, at least eleven States have statutes in which "brandishing a firearm" is either a crime itself or an element of a crime. *See* Pet. App. F.[6]

The Court need look no further than the text and structure of the statute, the historical treatment of brandishing and discharging, and its opinion in *Jones* to resolve this case. If any doubts remain, however, they are resolved by a review of the legislative history of the statute, which demonstrates that brandishing and discharging are elements of the offense.

---

[6] In *Castillo v. United States*, 530 U.S. 120, 126 (2000), the Court noted that "[t]raditional sentencing factors often involve . . . special features of the manner in which a basic crime was carried out (*e.g.*, . . . brandish[ing] a gun)." The Court's passing reference to brandishing in that context cannot negate the strong evidence that brandishing has traditionally been treated as an offense element. In *Castillo*, the issue before the Court was not whether brandishing was a traditional sentencing factor. Indeed, the opinion cites no State or federal provision treating the brandishing of a gun as a sentencing factor. Rather, the Court was simply stating that traditional sentencing factors often involve the manner in which a basic crime is carried out, and brandishing was nothing more than an example of what the Court meant.

B. The Legislative History Of The 1998 Amendment To § 924(c) Confirms That Congress Intended Brandishing A Firearm To Be An Element Of The Offense.

The legislative history of the 1998 amendment to § 924(c), which resulted in the current version of the statute, establishes that Congress intended the brandishing and discharging of a firearm to be elements of the offense. This intent is evident both in what the legislative history says and in what it does not say.

The 1998 amendment of § 924(c) is central to the analysis of the current version of the statute. There is no dispute that the use of a firearm under the prior version of this statute was an element of the offense that had to be charged in the indictment and proved to a jury beyond a reasonable doubt. Furthermore, it is clear that the word "uses" incorporated situations in which a defendant brandished or discharged a firearm. *See Bailey v. United States*, 516 U.S. 137, 148 (1995) (defining the word "uses" to include "brandishing" and "firing or attempting to fire a firearm"). Thus, under the earlier version of § 924(c)(1), any type of use, including brandishing and discharging, was an element of the offense.

Respondent's interpretation of the current version of § 924(c) then necessarily means that the 1998 amendment made a fundamental change to the statute by converting brandishing and discharging from offense elements to sentencing factors. This Court, however, has been reluctant to infer that Congress intended to make fundamental changes in statutes without an express indication, in the legislative history or otherwise, that this is what

Congress intended. *Jones*, 526 U.S. at 234 ("[it is a] fair assumption that Congress is unlikely to intend any radical departure from past practice without making a point of saying so"); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) ("[S]ilence [in legislative history] . . . while contemplating an important and controversial change in existing law is unlikely."); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991) (stating that an amendment to the National Labor Relations Act had been intended to make an "important" change, the Court "would expect to find some expression of that intent in the legislative history").

Here, the legislative history gives no indication that Congress intended to convert brandishing and discharging from offense elements to mere sentencing factors. To the contrary, the legislative history reveals that Congress had two principal purposes in amending § 924(c): to expand the scope of the criminal prohibition in the statute to include the mere possession of a firearm, and to increase certain penalties under the statute. Moreover, statements in the legislative history provide affirmative evidence that Congress understood brandishing and discharging to be offense elements.

1. Congress amended § 924(c) in direct response to this Court's opinion in *Bailey v. United States*.

Congress began the process of amending § 924(c) in 1996 in response to this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995). In *Bailey*, the Court interpreted an earlier version of § 924(c), which read:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . .

18 U.S.C. § 924(c)(1) (1994). The courts of appeals had read the "uses or carries" clause expansively, to include situations in which a defendant had a gun readily accessible but did not actually use it.[7] The Court disagreed. It concluded that mere possession was insufficient to establish criminal liability, and held that a defendant must instead actively employ a firearm. 516 U.S. at 143. "Had Congress intended possession alone to trigger liability under § 924(c)(1)," the Court stated, "it easily could have so provided." *Id.*

In direct response to *Bailey*, Congress undertook to provide just that, and immediately began to propose amendments to § 924(c).[8] Congress' purpose from the

---

[7] *See, e.g., United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir. 1990); *United States v. Plummer*, 964 F.2d 1251, 1255 (1st Cir. 1992); *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir. 1989); *United States v. Paz*, 927 F.2d 176, 179 (4th Cir. 1991); *United States v. Featherson*, 949 F.2d 770, 776 (5th Cir. 1991); *United States v. Torres-Mediana*, 935 F.2d 1047, 1049 (9th Cir. 1991); *United States v. Hager*, 969 F.2d 883, 889 (10th Cir. 1992); *United States v. Poole*, 878 F.2d 1389, 1393 (11th Cir. 1989).

[8] Bills introduced in the 104th Congress included S. 1612, S. 1945, and H.R. 125. Other bills introduced in the 105th Congress included S. 3, S. 15, S. 43, S. 362, S. 602, S. 2484, H.R. 424, H.R. 2340, H.R. 3155. The bill that the 105th Congress eventually passed was S. 191. It is appropriate to consider the entire

outset, then, was not to downgrade brandishing and discharging to sentencing factors, but rather to include mere possession as an additional element that would trigger liability under the statute.

When introducing S. 43, for example, Senator Helms made the following comment:

> The Court, in *Bailey versus United States*, interpreted the law to require that a violent felon actively employ a firearm as a precondition of receiving an additional five year sentence.
>
> . . .
>
> The Supreme Court, recognizing the consequences of its decision, issued this invitation to us: "Had Congress intended possession alone to trigger liability * * * it easily could have so provided." That, Mr. President, is precisely the intent of this legislation – to make clear that possession alone does indeed trigger liability.

143 Cong. Rec. S379-01, S405 (daily ed. Jan. 21, 1997).

Likewise, Senator Leahy stated in his introduction of S. 362:

> In *Bailey v. United States*, the Supreme Court put a restrictive interpretation of the verb "use" in relation to a firearms violation under 18 U.S.C. § 924(c). . . . The legislative proposal

---

legislative record where, as here, the statute is the product of several years of congressional consideration. *See, e.g., Hodel v. Virginia Surface & Mining & Reclamation Ass'n*, 452 U.S. 264, 278-80 & n.19 (1981) (relying on a legislative record compiled over six years).

> makes it clear that the statute punishes possession of a firearm, as well as its "use."

143 Cong. Rec. S1659-03, S1663 (daily ed. Feb. 26, 1997) (citations omitted).

Senator Hatch, who introduced the bill that was ultimately enacted, also made clear that the purpose of the measure was to respond to the Court's decision in *Bailey*, stating, "[t]oday, we are reviewing the impact on Federal drug and violent crime prosecutions of the Supreme Court's 1995 decision in *Bailey v. United States*. . . . This hearing will examine the impact of this decision and help us to assess the need for corrective legislation." *A Bill to Throttle Criminal Use of Guns: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. 1 (1997) (statement of Sen. Hatch, Chairman, Senate Committee on the Judiciary); *see also id.* at 5 (statement of Sen. Sessions) (the legislation would "mov[e] us back to the established law that we had before the *Bailey* decision"); *id.* at 2 (statement of Sen. DeWine); *id.* at 3-4 (statement of Sen. Helms); *id.* at 19 (statements of Sens. Kennedy & Thurmond).

Numerous other legislators expressed a similar understanding of the purpose behind the various proposals. Representative Gilman said "this legislation will allow Federal prosecutors to apply the mandatory sentence even if the criminal does not fire or brandish the weapon." 143 Cong. Rec. E80-03, E80 (daily ed. Jan 9, 1997). *See also* 144 Cong. Rec. H530-02, H531 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum); 144 Cong. Rec. H10329-01, H10330 (Oct. 9, 1998) (statements of Reps. McCollum & Myrick); H.R. Rep. No. 105-344, at 4

(1997). Ultimately, the bill that passed, S. 191, became known as the "*Bailey* Fix Act." 144 Cong. Rec. S12670-02, S102670 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine). Given this mass of evidence, there can be no dispute that Congress' goal in amending § 924(c) was to include possession of a firearm as an offense element.[9]

2. The congressional record reflects Congress' intent to treat brandishing and discharging as offense elements.

In addition, language in the record affirmatively suggests that Congress intended for brandishing and discharging to remain offense elements. The House Judiciary Committee discussed what the prosecution must prove to convict under the amended statute: "To sustain a *conviction* for brandishing or discharging a firearm, the government must demonstrate that the firearm was used 'during and in relation to' the commission of the federal crime of violence or drug trafficking crime." H.R. Rep. No. 105-344, at 12 (emphasis added). Additionally, the proposed amendment "defines the term 'brandish' for purposes of a § 924(c) *charge*." *Id.* (emphasis added). The Committee also stated "the test of whether the firearm intimidated or threatened [is] an objective one. Thus, unavailability of witnesses or disputes between witness

[9] The 104th Congress likewise pointed to the *Bailey* decision as the impetus to amend § 924(c). *See, e.g., Examining the Bailey Decision's Effect on Certain Prosecutions of Violent and Drug Trafficking Crimes: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 1-4 (1996) (Statements of Sens. DeWine & Helms, Members, Senate Committee on the Judiciary).

recollections would not preclude prosecutors from bringing a *charge* for brandishing a firearm under § 924(c)." *Id.* at 13 (emphasis added). The Court in *Jones* relied in part on the fact that the comments of certain Senators reflected an assumption that the amendment would establish elements to be proved at trial, highlighting one particular comment that referenced the term "convict[ion]." 526 U.S. at 238. The use of the terms "conviction" and "charge" in the congressional record here reflects a similar assumption: that brandishing and discharging must be charged in the indictment and proved at trial.

Moreover, Congress repeatedly discussed possessing, brandishing, and discharging together without ever suggesting that the first was an offense element while the latter two were sentencing factors. For example, Representative Norwood commented, "For any criminal in possession of a gun while committing a crime, this bill provides for a mandatory minimum sentence of 5 years in prison. For pulling that gun during a crime, 10 years. For firing it, 20 years." 142 Cong. Rec. E471-01, E471 (daily ed. Mar. 22, 1996) (statement of Rep. Norwood). *See also* 142 Cong. Rec. H2674-01, H2700 (daily ed. Mar. 22, 1996) (statement of Rep. Bereuter) ("this Member supports certain provisions of H.R. 125 that increase the mandatory minimum sentences for committing crimes while possessing, brandishing, or discharging a firearm"); 142 Cong. Rec. H2705-02, H2705 (daily ed. Mar. 22, 1996) (statement of Rep. Buyer) ("In this bill,. . . . [f]or the fact that he had possession of a firearm in the commission of that crime, even though he never pulled it, it is a mandatory minimum of 5 years. . . . If he pulls that weapon and he

brandishes that weapon . . . minimum 10 years. If in fact he discharges that firearm, 20 years.").

This uniform treatment of possessing, brandishing, and discharging continued into the 105th Congress. For example, Rep. McCollum described a bill as follows:

> Under this bill, the thug who uses a firearm in the commission of a crime receives a mandatory minimum sentence of 5 years above the sentence for the crime itself. If this same thug brandishes a weapon to incite fear in victims, it increases the sentence to 10 years. If a thug discharges the firearm, then the mandatory minimum is 20 years.

144 Cong. Rec. H530-02, H533 (daily ed. Feb. 24, 1998). *See also* H.R. Rep. No. 105-845, at 87 (1999) ("S. 191, as sent to the President, retains the 'possessing, brandishing, or discharging' language."); 144 Cong. Rec. S12670-02, S12670 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine).

While Congress repeatedly used possession, brandishing, and discharging in the same breath, it never once suggested that these factors would be subject to different levels of proof, or that only a sentencing judge need make a finding of brandishing or discharging by a preponderance of the evidence. Given this similar treatment, it would strain logic to suggest Congress intended possession to be an element, and brandishing and discharging to be only sentencing factors.[10]

---

[10] In addition to adding possession as an element of § 924(c), Congress also increased the penalties provided for by the statute. *See, e.g.*, 144 Cong. Rec. H10329-01, H10330 (daily ed. Oct. 9, 1998) (statement of Rep. Myrick) ("S. 191 clarifies that a criminal who possesses a gun while committing a violent crime or a drug crime will face a mandatory sentence. At the same time, the bill increases the mandatory sentence for such crimes."); H.R. Rep. No. 105-845, at 87. However, the fact that the amendment increased the *length* of the penalties does not show that Congress intended to create new sentencing *factors*. *See Jones*, 526 U.S. at 237-38 ("The Government points to several statements in the 1996 amendment's legislative history in which subsection (2) is described as providing a 'penalty enhancement'. . . . [We] find the quoted statements unimpressive."); *Castillo*, 530 U.S. at 129-30 (commenting that references in the congressional record to sentences did not suggest the amendment created sentencing factors when a preeminent feature of the amendment was the creation of a new mandatory prison term.); *Almendarez-Torres v. United States*, 523 U.S. 224, 234-35 (1998) (relying on the absence of any expression by Congress that it intended to create a new substantive offense to support the decision that the statute at issue created a new penalty provision rather than a substantive offense.).

C. Any Ambiguity In The Meaning Of § 924(c)(1)(A) Must Be Read In Petitioner's Favor.

The structure and history of § 924(c)(1)(A) leave little doubt that brandishing and discharging a firearm are offense elements that must be charged in the indictment and proved to a jury beyond a reasonable doubt. However, even if the statute were ambiguous, the rule of lenity and the doctrine of constitutional avoidance would require the ambiguity to be resolved in favor of Petitioner.

1. The Rule of Lenity.

The rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994) ("where text, structure, and history fail to establish that the Government's position is unambiguously correct," the court should resolve the ambiguity in the defendant's favor). As the Court has recognized, this rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Albernaz v. United States*, 450 U.S. 333, 342 (1981). As a result, the Court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.* (internal quotations omitted).

In this case, lenity requires that brandishing and discharging be treated as elements of the offense, entitling Petitioner to the full panoply of constitutional protections before his sentence can be increased by forty to 100 percent.[11] The difference between the standards of reasonable doubt and a preponderance of the evidence

---

[11] Treating brandishing as a sentencing factor does far more than deny a defendant his Fifth and Sixth Amendment rights. As the "criminal defendant is not entitled to trial-like procedural protections at a sentencing hearing," *United States v. Gatewood*, 230 F.3d 186, 191 (6th Cir. 2000) (en banc), *cert. denied*, 2002 WL 32559 (U.S. Jan. 14, 2002) (No. 00-7283), hearsay and other questionable evidence that would not be admissible at trial would be admissible at sentencing to show a defendant brandished a firearm.

can dramatically alter the outcome of a trial, especially in a case like this that is, as the district court admitted at sentencing, a "close call." Assuming that the Court is "genuinely uncertain as to Congress' intent" with regard to § 924(c)(1)(A), "the length and severity of [the] added mandatory sentence" that turns on a finding of brandishing or discharging "weigh[ ] in favor of treating such offense-related words as referring to an element." *Castillo*, 530 U.S. at 131; *see also Almendarez-Torres v. United States*, 523 U.S. 224, 271 (1998) (Scalia J., dissenting) (suggesting that the rule of lenity requires Congress to make its intentions "unambiguously clear" when it wishes for a fact to be treated as a sentencing factor rather than as an offense element).

2. The Doctrine of Constitutional Avoidance.

Like the rule of lenity, the doctrine of constitutional avoidance enables principled interpretation of ambiguous statutes. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also Jones*, 526 U.S. at 239. In this case, a construction of § 924(c) to the effect that brandishing and discharging a firearm are sentencing factors would raise grave and doubtful questions about the statute's constitutionality, including whether the statute violates the Fifth Amendment's due process and indictment provisions and the Sixth Amendment's jury trial and notice guarantees.

This Court held in *Apprendi v. United States*, 530 U.S. 466, 490 (2000), that it " 'is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' " Although the Court has previously held that facts increasing the mandatory minimum sentence for an offense do not have to be proved beyond a reasonable doubt to a jury, *see McMillan v. Pennsylvania*, 477 U.S. 79 (1986), its opinion in *Apprendi* casts doubt on that ruling, as discussed in Part II below. Therefore, the Court should avoid the difficult constitutional questions posed by Respondent's construction of the statute and hold that brandishing and discharging are offense elements of § 924(c)(1)(A).[12]

---

[12] As a practical matter, this reading of the statute does not necessitate unwieldy or complicated trials. The same or related evidence used to demonstrate that the defendant possessed a firearm would also likely show that the defendant brandished or discharged a firearm. *See Castillo*, 530 U.S. at 127-28. Nor does this interpretation of the statute harm defendants' interests by forcing them to offer inconsistent alternative arguments such as (1) I did not use or carry any firearm, and (2) even if I did, I didn't brandish it. *See id.* at 128. The prosecution's case under § 924(c)(1)(A) usually will involve "presenting a certain weapon (or weapons) to the jury and arguing that the defendant . . . used that weapon." *Id.* Indeed, in this case, Petitioner stipulated to possession of the gun, choosing only to contest whether the gun was used in connection with the drug sale. Even if a defendant did have to make this either-or argument, such a circumstance is no different than the frequent one faced by a defendant charged with lesser-included offenses (*i.e.* manslaughter occurred, but it was involuntary rather than voluntary).

II. THE CONSTITUTION REQUIRES THAT BRANDISHING A FIREARM BE TREATED AS AN OFFENSE ELEMENT UNDER § 924(c)(1)(A).

A. Any Fact That Alters Or Increases The Prescribed Range Of Penalties To Which A Defendant Is Exposed Must Be Charged In The Indictment, Submitted To A Jury, And Proved Beyond A Reasonable Doubt.

Even if § 924(c)(1)(A) unambiguously set forth sentencing factors and not offense elements, the Court still must reverse the ruling below. Regardless of whether Congress intended for brandishing and discharging to be sentencing factors, the Constitution requires that they be treated as offense elements that must be charged in the indictment and proved to a jury beyond a reasonable doubt.

Under the Due Process Clause of the Fifth Amendment, a defendant cannot be convicted of a criminal offense "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). In addition, the Fifth and Sixth Amendments entitle a defendant to notice of the charges against him and to trial before a jury. *See Almendarez-Torres v. United States*, 523 U.S. 224, 239 (1998). As the Court has long recognized, these requirements have a "vital role in our criminal procedure." *In re Winship*, 397 U.S. at 363. They reduce the risk that a defendant will be erroneously deprived of his liberty and stigmatized by a wrongful conviction, thus giving concrete meaning to the presumption of innocence

that is central to the Anglo-American legal tradition. *See Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000).

In determining which facts are necessary to constitute a crime – and thus must be charged in the indictment and proved to a jury beyond a reasonable doubt – the Court has traditionally deferred to the elements of the offense as defined by the legislature. *See Patterson v. New York*, 432 U.S. 197, 211 n.12 (1977). But the Court has repeatedly emphasized that in defining those elements, "there are obviously constitutional limits beyond which the States may not go." *See id.* at 210; *see also Apprendi*, 530 U.S. at 486 (stating that "constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense"); and *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (noting that "of course, there are constitutional limits to the State's power in this regard").

In *Apprendi*, the Court elaborated upon those limits. There, the defendant was convicted of an assault that carried a maximum sentence of ten years in prison. 530 U.S. at 469-70. At sentencing, however, he received twelve years on the basis of New Jersey's hate crime statute, which authorized an increase in the maximum sentence to twenty years if the sentencing judge found beyond a preponderance of the evidence that the crime was motivated by racial bias. *Id.* at 470-71. Although New Jersey law expressly stated that racial bias was a sentencing factor, the defendant argued that he was entitled to have the issue submitted to a jury and proved beyond a reasonable doubt.

The Court agreed. Based on an analysis of both precedent and historical practice, it held that "[o]ther than

the fact of a prior conviction, any fact that increases . . . the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In addition, the Court endorsed the statements of Justices Stevens and Scalia in their concurring opinions in *Jones*. *Id.* ("we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]"). In that concurrence, Justice Scalia wrote that "it is unconstitutional to remove from the jury the assessment of facts that *alter* the congressionally prescribed *range of penalties* to which a criminal defendant is exposed." *Jones v. United States*, 526 U.S. 227, 253 (1999) (Scalia, J., concurring) (emphases added). Justice Stevens had expressed a similar view, writing that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" must be submitted to a jury and "established by proof beyond a reasonable doubt." *Id.* at 252-53 (Stevens, J., concurring).

Like the hate-crime statute in *Apprendi*, the brandishing and discharging provisions of § 924(c)(1)(A) alter and increase the prescribed range of penalties to which a criminal defendant is exposed. Without a finding that a defendant brandished or discharged a firearm, the penalty range for a conviction under § 924(c)(1)(A) is five years to life in prison. With a finding that a defendant brandished a firearm, however, the penalty range increases to seven years to life in prison. And if the court finds that a defendant discharged a firearm, the range doubles to ten years to life in prison.

Although a finding that a defendant brandished or discharged a firearm does not increase the statutory maximum sentence, as did the finding in *Apprendi*, the

requirements of due process do not turn on this distinction. First, the concerns underlying the reasonable doubt requirement apply with equal force to factors that increase the statutory minimum sentence. Second, courts have historically treated any factor that altered a defendant's punishment as an element of the offense, without distinguishing between increases in maximums and minimums. And third, a distinction between increases in maximums and minimums would allow legislatures to circumvent the requirements of *Apprendi*.[13]

1. The concerns underlying the reasonable doubt requirement apply with equal force to findings that increase the statutory maximum sentence and to those that increase the mandatory minimum sentence.

As explained above, the reasonable doubt requirement serves two functions: It reduces the risk that a defendant will be erroneously deprived of liberty, and protects defendants from the stigma of a wrongful

---

[13] An additional reason not to distinguish between increases in the statutory maximum and the statutory minimum is that in both situations, the legislature has singled out one factor and given it so much weight that it alone alters the sentencing range. When a legislature places such great emphasis on one of many components of the crime, the Constitution requires that it treat that component as an element of the offense. *See McMillan v. Pennsylvania*, 477 U.S. 79, 96 (1986) (Stevens, J., dissenting) ("Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.").

conviction. *See Apprendi*, 530 U.S. at 484. Because a factor that increases the statutory maximum sentence heightens both the loss of liberty and the stigma attached to the offense, the Court has held that such factors must be proved to a jury beyond a reasonable doubt. As the Court explained in *Apprendi*:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Id. at 484.[14]

Just as an increase in the statutory maximum sentence heightens the loss of liberty and the stigma of conviction, so too does an increase in the mandatory minimum sentence. In this case, the charge against the Petitioner for carrying a firearm under § 924(c)(1)(A)

---

[14] The Court expressed a similar point in *Mullaney v. Wilbur*:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly.

421 U.S. 684, 698 (1975).

carried a sentence of five years to life. Thus, upon conviction, Petitioner faced at least a five-year loss of liberty and being stigmatized as someone who carried a firearm while dealing drugs. But when the judge found that he had brandished a firearm, Petitioner's mandatory loss of liberty increased to a minimum sentence of seven years in prison. In addition, instead of being stigmatized as someone who merely carried a firearm, he became stigmatized as a much more dangerous character who brandished a firearm.

A similar example is found in 21 U.S.C. § 848(a), which makes it a crime to engage in a continuing criminal enterprise involving the sale of drugs. Upon conviction of this offense, a defendant faces a sentence of twenty years to life in prison. But under 21 U.S.C. § 848(b), the mandatory minimum sentence increases to life in prison if a judge finds that the defendant was the leader or organizer of the enterprise and that a large quantity of drugs or money was involved. *See United States v. Smith*, 223 F.3d 554, 562-63 (7th Cir. 2000). Thus, a defendant who at the conclusion of his jury trial is eligible to receive a sentence of twenty years could suddenly be faced with the prospect of a mandatory life sentence, solely on the basis of facts that were not charged in the indictment, not submitted to a jury, and not proved beyond a reasonable doubt. This heightened loss of liberty is every bit as real as the loss of liberty in *Apprendi* and illustrates why increases in the mandatory minimum sentence are no less severe than increases in the statutory maximum sentence.

The Court has also acknowledged that an increase in a mandatory minimum sentence may have a more severe impact than an increase in the statutory maximum

sentence. *See Almendarez-Torres*, 523 U.S. at 244-45; *see also Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting). Even with a finding that increases the statutory maximum sentence, a sentencing judge can still impose a sentence that is lower than the maximum; indeed she can impose a sentence within the initial statutory range. *Apprendi*, 530 U.S. at 470-71 (defendant received a twelve-year sentence, although the statutory maximum had increased to twenty years.) But when a finding increases the mandatory minimum sentence, the judge is bound by that new minimum and cannot impose a lesser sentence, even if she wants to. A mandatory minimum sentence thus "can eliminate a sentencing judge's discretion in its entirety. And it can produce unfairly disproportionate impacts on certain kinds of offenders." *See Almendarez-Torres*, 523 U.S. at 245 (citation omitted).

Increases in the mandatory minimum sentence do differ from increases in the statutory maximum sentence in one respect. In the latter situation, a defendant may receive a sentence longer than the initial statutory range, while in the former, he will always be sentenced within the prescribed range. But as this case demonstrates, that distinction is immaterial. Although Petitioner did not receive any sentence he could not theoretically have received otherwise, he was denied the opportunity to argue for, much less receive, a sentence lower than seven years. At the same time, the prosecution enjoyed a significant advantage it would not otherwise have had. It was "empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring). This alteration of the rights and entitlements

stemming from the Petitioner's conviction implicates the core concerns of the due process clause and illustrates why any finding that increases the mandatory minimum sentence must be proved to a jury beyond a reasonable doubt.

Moreover, although it is possible that a defendant convicted under § 924(c)(1)(A) could receive a seven-year sentence even without a finding that he brandished a firearm, it is by no means certain. The sentencing guidelines for § 924(c)(1)(A) instruct judges to impose the minimum sentence required by the statute. *See U.S. Sentencing Guidelines Manual* § 2K2.4(a)(2) (2001). Judges may depart upward from this recommendation, but only if they articulate a legally permissible justification. And statistics show that judges almost never depart upward from the recommended range. *See* U.S. Sentencing Comm'n, *Federal Sentencing Statistics for Fiscal Year 2000*, at tbl. 8 (2001) (showing that judges departed upward in less than one percent of cases). In addition, as Justice Thomas and others have pointed out, "it is likely that the change in the range available to the judge affects his choice of sentence." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring); *see also Hobbs v. State*, 44 Tex. 353, 1875 WL 7696, at *2 (1875) (noting that it is "impossible to say . . . that the erroneous charge of the court may not have had some weight in leading the jury to" impose the sentence that it did); *Searcy v. State*, 1 Tex. App. 440, 1876 WL 9086, at *3 (1876) (same). Thus, the judge's finding that Petitioner brandished a firearm had a very real effect on the sentence he ultimately received.

2. Historically, courts treated all factors that altered a defendant's punishment as elements of the offense.

Not only do the underlying concerns of the reasonable doubt requirement apply with equal force to factors that increase the statutory minimum sentence and to those that increase the statutory maximum sentence, but history provides no support for distinguishing between the two. As Justice Thomas demonstrated in his *Apprendi* concurrence, courts throughout the Nineteenth Century held that the elements of an offense included any "fact that [was] by law the basis for imposing or increasing punishment." *See Apprendi*, 530 U.S. at 502.

In *Hobbs v. State*, 44 Tex. 353, 1875 WL 7696 (1875), for instance, the defendant was indicted for a burglary that was punishable by two to five years in prison. A separate statute allowed the sentence to be doubled if the burglary was committed with an excessive degree of force. At trial, the judge instructed the jury to sentence the defendant to two to ten years if it found the extra level of force, and the jury sentenced him to three. But the Texas Supreme Court reversed the sentence because the indictment had not alleged the extra degree of force. Even though the defendant was sentenced within the range authorized by the indictment, the court thought it "impossible to say . . . that the erroneous charge of the court may not have had some weight in leading the jury to affix three years imprisonment instead of the minimum two years." *Id.* at *2.

Numerous other courts ruled that any fact relevant to the defendant's sentence is an element of the offense that

must be charged in the indictment. For example, in *Hope v. Commonwealth*, 50 Mass. 134, 1845 WL 4043 (1845), the Supreme Judicial Court of Massachusetts overturned a defendant's conviction for larceny because the value of the individual items stolen had not been charged in the indictment. Under Massachusetts law, the court pointed out, punishment varied with value. Therefore, the "value of the property alleged to be stolen must be set forth in the indictment." *Id.* at *2; *see also Commonwealth v. Smith*, 1 Mass. 245, 1804 WL 709, at *1-*2 (1804) (same); *Ritchey v. State*, 7 Blackf. 168, 1844 WL 2999 (Ind. 1844) (indictment for arson must allege the value of the property destroyed because punishment varies with value); *Brightwell v. State*, 41 Ga. 482, 1871 WL 2314, at *1 (1871) ("When the law prescribes a different punishment for different phases of the same crime, there is good reason for requiring the indictment to specify which of the phases the prisoner is charged with."); *United States v. Reese*, 92 U.S. 214, 232 (1875) ("[t]he indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted").

In many cases, courts confronted statutes where "the aggravating fact raised the whole range – both top and bottom." *See, e.g., Garcia v. State*, 19 Tex. App. 389, 1885 WL 6922, at *3 (1885); *Johnson v. State*, 55 N.Y. 512, 1874 WL 11015 (1874); *Lacy v. State*, 15 Wis. 13, 1862 WL 951, *2-*3 (1862). But as Justice Thomas pointed out, "[t]hose courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law." *Apprendi*, 530 U.S. at 522 (Thomas, J., concurring).

The leading criminal procedure treatise of the Nineteenth Century confirms that all facts relevant to punishment were regarded as elements. *See* 1 J. Bishop, *Law of Criminal Procedure* 50 (2d ed. 1872). In discussing the requirement that an indictment must allege all facts necessary to constitute the crime, Bishop explained that this included "whatever is in law essential to the punishment sought to be inflicted." *Id.* (capitalization omitted). He also noted that "the indictment must . . . contain an averment of every particular thing which enters into the punishment," and that a crime consists of the whole of "the wrong upon which the punishment is based." *Id.* at 53, 330. And to make clear that even facts that fell short of increasing the statutory maximum sentence were regarded as elements, Bishop stated that where a statute created an aggravated offense carrying a "punishment [ ] heavier than . . . *or differing from*" the non-aggravated offense, the "aggravating matter is required to be set out in the indictment." *Id.* at 52 (emphasis added); *see also id.* at 51 ("it is, in reason, not lawful and not just to visit [a man] . . . with any punishment exceeding in amount, or in kind *differing* from, what the law has set down as the penalty for the particular acts alleged") (emphasis added).

3. Distinguishing between factors that increase statutory maximum sentences and mandatory minimum sentences would allow legislatures to circumvent *Apprendi*.

Finally, if the Court limits its holding in *Apprendi* to factors that increase the statutory maximum sentence, it will leave legislatures a sizeable loophole through which

to evade the reasonable doubt requirement. In order to avoid the requirement that no sentencing factor increase the defendant's penalty beyond the statutory maximum, legislatures would need only raise all statutory maximum sentences to life in prison and then give judges guided discretion with respect to a few specially selected factors. As the dissent in *Apprendi* pointed out, this possibility could render *Apprendi* nothing more than a meaningless formalism. *Apprendi*, 530 U.S. at 539. (O'Connor, J., dissenting).

The majority in *Apprendi* responded to this concern by stating that "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime." *Id.* at 490 n.16 (emphasis omitted). Structural democratic constraints, however, can be relied upon only when the majority's interests are aligned with the interests of the minority whose rights are at risk. *See* Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 Am. Crim. L. Rev. 255, 274-79 (2001). Given that only a small majority of Americans would ever be prosecuted under § 924(c)(1)(A), legislators have little incentive to consider the consequences of exposing defendants to a maximum sentence of life in prison. Similarly, the rest of the public would have scant reason to closely scrutinize the enactment of such a law. *See id.* (noting that "criminals generally do not have effective lobbyists.")

Experience also indicates that structural democratic constraints do not deter legislators from rewriting criminal statutes to evade the reasonable doubt requirement. According to a recent study, after several of the Court's major decisions, state legislatures have identified ways in which they could evade procedural guarantees through changes in substantive criminal law. *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1489-92 (2001). For instance, in the wake of the Court's ruling that defendants can be required to prove insanity beyond a reasonable doubt, *see Leland v. Oregon*, 343 U.S. 790 (1952), fifteen states relieved the prosecution of the burden of proving that the defendant was sane when he committed the offense. *See* King & Klein, *supra*, at 1491-92. Nine states relieved the prosecution of the burden of proving the absence of heat of passion in the aftermath of *Patterson*, 432 at 211 n.12. King & Klein, *supra*, at 1492. And in response to *McMillan*, five states instructed judges to impose mandatory minimum sentences when they found, by a preponderance of evidence, that the defendant possessed a firearm while committing a felony offense. *Id.* Given this record, the Court should not rely on structural democratic constraints now. *See also* Kyron Huigens, *Rethinking the Penalty Phase*, 32 Ariz. St. L.J. 1195, 1282 n.266 (2000) (concluding that reliance on structural democratic restraints "has had a predictable result: the legislatures, particularly Congress, have run roughshod over the Court's trust.")

In sum, the Court should not limit the principles it announced in *Apprendi* to factors that increase a defendant's penalty beyond the statutory maximum. Instead, it should extend that decision to its logical conclusion and

hold that any fact that alters the prescribed range of penalties – by raising either the minimum or maximum – must be charged in the indictment, submitted to a jury, and established by proof beyond a reasonable doubt.[15]

B. The Court's Decision In *McMillan* Has Been Undermined By Developments In The Law And A New Understanding Of The Historical Treatment Of Offense Elements.

In extending *Apprendi* to its logical conclusion, the Court must, and should, overrule *McMillan*. In that case, the Court upheld a Pennsylvania statute that required a judge to impose a mandatory minimum sentence of five

---

[15] In adopting this rule, the Court need not address the constitutionality of the United States Sentencing Guidelines. The Guidelines channel a judge's discretion in deciding upon a sentence within the prescribed statutory range, but they do not eliminate judicial discretion. A judge who thinks the sentence recommended by the guideline range is too severe may depart downward and impose a sentence at the bottom of the statutory range. Indeed, 34 percent of all defendants sentenced under the guidelines in 2000 received a sentence lower than the recommended range. *See* U.S. Sentencing Comm'n., *supra*, at tbl. 8.

A mandatory minimum, by contrast, eliminates all judicial discretion to depart downward. Once a judge finds the existence of facts that trigger the mandatory minimum, the prescribed sentencing range shifts, increasing the prosecution's entitlement and eliminating the defendant's opportunity to obtain a lower sentence. It is this alteration of the rights and entitlements stemming from the defendant's conviction that violates due process and that distinguishes increases in statutory mandatory minimum sentences from the Sentencing Guidelines.

years in prison if she found by a preponderance of evidence that a defendant "visibly possessed a weapon" while committing a felony. Although several members of this Court have argued that *McMillan* was wrongly decided, *see Apprendi*, 530 U.S. at 521-22 (Thomas, J., concurring); *Jones*, 526 U.S. at 253 (Stevens, J., concurring), the Court in *Apprendi* "reserve[d] for another day the question whether *stare decisis* considerations preclude reconsideration" of that decision. *See* 530 U.S. at 487 n.13. If the Court rejects Petitioner's statutory construction argument in Part I, then this case squarely presents the issue of *McMillan's* continuing validity, and the Court should now address that question.

Like any decision of the Court, *McMillan* is undergirded by stare decisis. However, "*[s]tare decisis* is not . . . a universal, inexorable command." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting), *overruled on other grounds, Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938). It is a flexible rule, subject to "prudential and pragmatic considerations" that focus on the workability and continuing validity of the underlying decision. *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992). In this case, those considerations argue in favor of overruling *McMillan*.

First and foremost, the Court's recent decisions cast serious doubt on the continuing validity of *McMillan*. Here, "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Casey*, 505 U.S. at 855; *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989). In both *Jones* and *Apprendi*, the Court rejected *McMillan's* premise that factors relevant only to sentencing need not

be proved to a jury beyond a reasonable doubt. *See Jones*, 526 U.S. at 248 ("removing [from the jury] control over facts determining a statutory sentencing range would . . . raise a genuine Sixth Amendment issue not yet settled"); *Apprendi*, 530 U.S. at 490 (" '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' ") (alteration in the original). Indeed, as the dissenters in *Apprendi* acknowledged, the Court's decision in that case all but overruled *McMillan*.[16] *See Apprendi*, 530 U.S. at 533 (O'Connor, J. dissenting) (noting that "[t]he essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today").

Second, the law relating to sentencing factors and offense elements has long been the subject of conflicting opinions. Each of the Court's recent decisions in this area has been "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," a circumstance that weakens the case for adherence to precedent. *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991). Moreover, in each of these decisions, the "narrow" majority and the "spirited" dissent were at loggerheads over the proper interpretation of the decisions that came before. *See, e.g., Apprendi*, 530 U.S. 466

---

[16] The Court itself seems to have recognized this as well. Among the numerous cases that the Court has remanded for reconsideration in light of *Apprendi*, many have involved increases in the statutory minimum, not the statutory maximum. *See United States v. Norris*, 143 F. Supp. 2d 243, 248 (E.D.N.Y. 2001) (listing cases).

(2000) (5-4 decision); *id.* at 531-38 (O'Connor, J., dissenting) (contending that majority opinion conflicts with *Almendarez-Torres*, *Patterson*, *McMillan*, and *Walton v. Arizona*, 497 U.S. 639 (1990)); *Jones*, 526 U.S. 227 (1999) (5-4 decision); *id.* at 254, 266-70 (Kennedy, J., dissenting) (contending that majority opinion misreads *Almendarez-Torres* and *McMillan*); *Monge v. California*, 524 U.S. 721 (1998) (5-4 decision); *id.* at 741 (Scalia, J., dissenting) (characterizing *Almendarez-Torres* as "a grave constitutional error affecting the most fundamental of rights"); *Almendarez-Torres*, 523 U.S. 224 (1998) (5-4 decision); *id.* at 253-56 (Scalia, J., dissenting) (contending that the majority "ignore[s] or distort[s] the analysis of *McMillan*); *McMillan*, 477 U.S. 79 (1986) (5-4 decision); *id.* at 98-99 (Stevens, J., dissenting) (contending that the majority misreads *Patterson* and *In re Winship*); *Patterson v. New York*, 432 U.S. 197 (1977) (5-3 decision); *id.* at 221-24 (Powell, J., dissenting) (challenging the majority's reading of *Mullaney*; contending that its interpretation of *Mullaney* "clos[es] its eyes to the constitutional values for which *Winship* stands").

Third, the force of precedent is lessened where "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854. This principle permits the Court "to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting); *see also* B. Cardozo, *The Nature of the Judicial Process* 151 (1921). Here, further examination of the common law understanding of offense elements has, at a minimum, caused the Court to view differently the scope of the Fifth and Sixth Amendment

protections. *See Apprendi*, 530 U.S. at 477-82 (observing that at common law, "just as the circumstances of the crime and the intent of the defendant . . . were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment"); *id.* at 501-18 (Thomas, J., concurring) (demonstrating that "the common law rule would cover the *McMillan* situation of a mandatory minimum sentence"). This examination has revealed that at common law, facts that changed the sentencing *range* – maximum or minimum – were regarded as elements of the offense that must be charged in the indictment and submitted to the jury. Given that the constitutional analysis of offense elements depends heavily on historical practice, *see Jones*, 526 U.S. at 234-35 (noting the need to consider the "traditional treatment of certain categories of important facts"); *Almendarez-Torres*, 523 U.S. at 243-44 (considering the historical treatment of recidivism), this new evidence provides a strong argument for overruling *McMillan*.

Finally, *McMillan* involves a constitutional rule, and this Court has long recognized that the force of precedent in such cases is weaker than in cases involving statutory construction. *See McLean Credit Union*, 491 at 172-73; *Burnet*, 285 U.S. at 406-07 (Brandeis, J., dissenting). *McMillan's* constitutional holding, never an uncontroverted decision in this area of deeply conflicted opinions from the Court, is no longer valid in light of *Jones* and *Apprendi*, and the Court's further examination of the common law understanding of offense elements. Facts selected by the legislature to trigger an increase in the statutory mandatory minimum sentence should not be

treated as mere sentencing factors, but rather, should be treated as elements of the offense.

C. Even If *McMillan* Remains Good Law, The Court Should Reverse Because The Amendments To § 924(c)(1) Raise The Specter Of Congress Restructuring Crimes To Evade The Requirements Of *Winship*.

Even if *McMillan* stands, the Court should reverse the ruling below because any construction of § 924(c)(1)(A) that relegates brandishing and discharging to mere sentencing factors violates the principle that a legislative body may not restructure existing crimes to evade the requirements stated in *In re Winship*, 397 U.S. at 364.

In this area of conflicting opinions from the Court, one principle has remained constant: although courts usually defer to a legislature's definition of an offense, legislatures cannot merely re-label offense elements as sentencing factors to evade constitutional due process requirements. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), for instance, the Court struck down a Maine statute that relieved the prosecution of the burden of proving malice aforethought in order to obtain a murder conviction. Although Maine had not made malice an element of the crime of murder, the Court ruled that this fact alone was not dispositive:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be

> necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Id. at 698.

The Court reaffirmed this principle in *McMillan*. In ruling that the Pennsylvania statute at issue did not violate the Constitution, the Court observed that "the specter . . . of States restructuring existing crimes in order to 'evade' the commands of *Winship* just does not appear in this case." 477 U.S. at 89. Pennsylvania, the Court noted, "did not change the definition of any existing offense," but instead took a factor that had always been relevant to punishment and dictated the precise weight it would be given. *See id.; see also Apprendi*, 530 U.S. at 552-53 (O'Connor J., dissenting) (noting that the New Jersey statute "gives no impression of having been enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense. For example, New Jersey did not take what had previously been an element of the weapons possession offense and transform it into a sentencing factor."); *Almendarez-Torres*, 523 U.S. at 246 (concluding that "[t]he relevant statutory provisions do not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in *McMillan*, to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense").

Unlike *McMillan*, *Apprendi*, and *Almendarez-Torres*, this case raises the specter of a legislature restructuring existing crimes in order to evade the commands of *Winship*. As explained in Part I of Petitioner's brief, prior to

the 1998 amendments, brandishing and discharging were treated as offense elements in § 924(c)(1). Petitioner argues that because Congress did not express any intent to convert brandishing and discharging into sentencing factors, they should be treated as offense elements under the amended statute as well. If the Court disagrees, then Congress has taken what were traditionally treated as offense elements and turned them into penalty enhancements that only have to be proved beyond a preponderance of the evidence. At the same time, Congress has raised the maximum penalty for using, carrying, or possessing a firearm from five years to life in prison, thereby ensuring that the punishment attached to the newly created penalty enhancements could never exceed the statutory maximum sentence for the underlying offense.

This situation is precisely what the Court warned of in *Mullaney*, and what *Winship* and *McMillan* forbid. Congress has "redefine[d] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney*, 421 U.S. at 698. Nowhere in its discussions of § 924(c)(1)(A) did Congress explain why it made this change. Nor did Congress explain why it increased the statutory maximum sentence for the underlying offense from five years to life in prison. In the absence of such explanations, the amendments to § 924(c)(1)(A) violate the commands of *Winship*. As a result, due process requires that brandishing and discharging a firearm be treated as elements of the offense that must be charged in the indictment and proved to a jury beyond a reasonable doubt.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the decision of the Fourth Circuit Court of Appeals be reversed, Petitioner's seven-year term of imprisonment be overturned, and this case be remanded to the district court for resentencing.

WILLIAM C. INGRAM
First Assistant Federal
Public Defender
Counsel of Record
LOUIS C. ALLEN, III
Federal Public Defender
ELIZABETH A. FLAGG
Research & Writing Attorney
FEDERAL PUBLIC DEFENDER
OFFICE
Suite 210
101 South Elm Street
Greensboro, North Carolina
27401
(336) 333-5455

JEFFREY T. GREEN
JACQUELINE GERSON COOPER
ALEXANDRA R. GELBER
ERIC A. SHUMSKY
SIDLEY AUSTIN BROWN &
WOOD
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

Supreme Court, U.S.
FILED
FEB 22 2002
CLERK

No. 00-10666

In the Supreme Court of the United States

WILLIAM JOSEPH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

58 pp

QUESTION PRESENTED

The Court granted certiorari limited to the following question:

Given that a finding of "brandishing," as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	6
Argument:	
I. Section 924(c)(1)(A) defines a single federal crime with three sentencing provisions	9
A. Section 924(c)(1)(A)'s language and structure indicate that brandishing and discharging are sentencing factors	10
B. Brandishing and discharging a firearm are traditional sentencing factors	13
C. The legislative history of Section 924(c) confirms that brandishing and discharging are sentencing factors	16
D. Neither the rule of lenity nor the doctrine of constitutional doubt applies here	18
II. The Constitution does not require that any fact that increases a defendant's statutory mandatory minimum sentence be alleged in the indictment and proved beyond a reasonable doubt at trial	20
A. Mandatory minimum sentencing provisions serve legitimate legislative purposes	21
1. The legislature's authority over sentencing includes specification of mandatory minimum penalties	21
2. The legislature may reasonably assign mandatory sentencing factors to the courts	25

TABLE OF CONTENTS—Continued:

	Page
B. The Constitutional values served by *Apprendi* do not apply to mandatory minimum sentencing provisions	27
a. *Sixth Amendment*	28
b. *Reasonable Doubt*	29
c. *Grand Jury Clause*	29
C. History casts no doubt on the constitutionality of mandatory minimum sentencing factors	31
D. Policy considerations do not favor petitioner's position	36
1. Mandatory minimum sentencing provisions do not permit circumvention of *Apprendi*	36
2. Overturning mandatory minimum sentencing provisions would undermine sentencing reform efforts	38
E. Stare Decisis supports *McMillan's* continuing validity	43
Conclusion	45
Appendix	1a

TABLE OF AUTHORITIES

Cases:

	Page
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998)	9, 19, 26
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	*passim*
Bailey v. *United States*, 516 U.S. 137 (1995)	18
Brightwell v. *State*, 41 Ga. 482 (1871)	33
Bullington v. *Missouri*, 451 U.S. 430 (1981)	22
Castillo v. *United States*, 530 U.S. 120 (2000)	10, 11, 12, 13, 16
Chaffin v. *Stynchcombe*, 412 U.S. 17 (1973)	25
Commonwealth v. *Smith*, 1 Mass. (1 Will.) 245 (1804)	33

Cases—Continued:

	Page
Dickerson v. *United States*, 530 U.S. 428 (2000)	43
Dorszynski v. *United States*, 418 U.S. 424 (1974)	22-23
Duncan v. *Louisiana*, 391 U.S. 145 (1968)	27, 28
Edwards v. *United States*, 523 U.S. 511 (1998)	39
Garcia v. *State*, 19 Tex. Ct. App. 389 (1885)	33
Gardner v. *Florida*, 430 U.S. 349 (1977)	31
Hernandez v. *United States*, 226 F.3d 839 (7th Cir. 2000)	39
Hobbs v. *State*, 44 Tex. 353 (1875)	32
Hope v. *Commonwealth*, 50 Mass. (9 Met.) 134 (1845)	32
Hubbard v. *United States*, 514 U.S. 695 (1995)	43
Johnson v. *State*, 55 N.Y. 512 (1874)	32, 34
Jones v. *United States*, 526 U.S. 227 (1999)	*passim*
Koon v. *United States*, 518 U.S. 81 (1996)	40, 41
Lacy v. *State*, 15 Wis. 13 (1862)	33
Martin v. *Ohio*, 480 U.S. 228 (1987)	35, 38
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986)	*passim*
Medina v. *California*, 505 U.S. 437 (1992)	32
Melendez v. *United States*, 518 U.S. 120 (1996)	42
Mistretta v. *United States*, 488 U.S. 361 (1989)	22, 38 40, 42
Monge v. *California*, 524 U.S. 721 (1998)	27
Muscarello v. *United States*, 524 U.S. 125 (1998)	18
Oyler v. *Boles*, 368 U.S. 448 (1962)	30
Patterson v. *New York*, 432 U.S. 197 (1977)	32, 35, 38
Payne v. *Tennessee*, 501 U.S. 808 (1991)	22, 43
People v. *Coleman*, 145 Cal. 609 (1904)	33
People v. *Raymond*, 96 N.Y. 38 (1884)	34
Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992)	43
Ritchey v. *State*, 7 Blackf. 168 (Ind. 1844)	32
Smith v. *United States*, 508 U.S. 223 (1993)	11
Staples v. *United States*, 511 U.S. 600 (1994)	9
Stinson v. *United States*, 508 U.S. 36 (1993)	39
United States v. *Barton*, 257 F.3d 433 (5th Cir. 2001), cert. denied, 122 S. Ct. 905 (2002)	17-18

Cases—Continued: Page

United States v. *DiFrancesco*, 449 U.S. 117 (1980) 26
United States v. *Doggett*, 230 F.3d 160 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001) 39
United States v. *Grayson*, 438 U.S. 41 (1978) 22, 24
United States v. *Heckard*, 238 F.3d 1222 (10th Cir. 2001) 39
United States v. *Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000) 39
United States v. *Kinter*, 235 F.3d 192 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001) 39
United States v. *Lewis*, 236 F.3d 948 (8th Cir. 2001) 39
United States v. *Miller*, 471 U.S. 130 (1985) 30
United States v. *Nealy*, 232 F.3d 825 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001) 39
United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) 19
United States v. *Reese*, 92 U.S. 214 (1875) 36
United States v. *Rodriguez-Moreno*, 526 U.S. 275 (1999) 10, 18
United States v. *Scott*, 437 U.S. 82 (1978) 26
United States v. *Watts*, 519 U.S. 148 (1997) 28
United States v. *Williams*, 235 F.3d 858 (3d Cir. 2000), cert. denied, 122 S. Ct. 49 (2001) 39
Williams v. *New York*, 337 U.S. 241 (1949) 22, 24, 26, 35
Williams v. *United States*, 503 U.S. 193 (1992) 39
Winship, In re, 397 U.S. 358 (1970) 27, 29
Witte v. *United States*, 515 U.S. 389 (1995) 25
Wood v. *Georgia*, 370 U.S. 375 (1962) 29

Constitution, statutes and rule:

U.S. Const.:
Amend. V (Grand Jury Clause) 8, 12, 1a
Amend. VI 8, 20, 27, 28, 1a
Act of Oct. 27, 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 to 3207-4 44

Statutes and rules—Continued: Page

Act of Nov. 18, 1998, Pub. L. No. 100-690, § 6371, 102 Stat. 4370 44
Act of Apr. 24, 1996, Pub. L. No. 104-132, § 708(a), 110 Stat. 1296 44
Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-26:
§ 121, 110 Stat. 3009-29 (18 U.S.C. 2252A) 44
§ 203(e)(2)(E)(ii), 110 Stat. 3009-567 14
Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 19
Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.* 23
18 U.S.C. 3552(d) 30
18 U.S.C. 3553(b) 39
18 U.S.C. 3553(e) 40, 41
18 U.S.C. 3553(f) 40, 41
18 U.S.C. 3559(c) (1994 & Supp. V 1999) 14
18 U.S.C. 3559(c)(2)(A) (1994 & Supp. V 1999) 14
18 U.S.C. 3559(c)(2)(D) 14
18 U.S.C. 3559(c)(2)(F)(i) (1994 & Supp. V 1999) 14
2 U.S.C. 167d 15
18 U.S.C. 844(f) 44
18 U.S.C. 844(i) 44
18 U.S.C. 922(q)(3)(A) (1994 & Supp. V 1999) 15
18 U.S.C. 924(c) (1994 & Supp. V 1999) ..... *passim*
18 U.S.C. 924(c)(1) (1994 & Supp. V 1999) 2, 3, 10, 16, 18, 36-37
18 U.S.C. 924(c)(1)(A) (1994 & Supp. V 1999) 6, 7, 9, 10, 15, 19, 36, 1a-2a
18 U.S.C. 924(c)(1)(A)(i) (1994 & Supp. V 1999) 4, 1a
18 U.S.C. 924(c)(1)(A)(ii) (1994 & Supp. V 1999) 4, 5, 6, 23, 37, 2a
18 U.S.C. 924(c)(1)(A)(iii) (1994 & Supp. V 1999) 23, 2a
18 U.S.C. 924(c)(4) (1994 & Supp. V 1999) 16, 3a
18 U.S.C. 924(j) (Supp. V 1999) 12
18 U.S.C. 929(a) 14
18 U.S.C. 2119 11

Statutes and rules—Continued: Page

21 U.S.C. 841(a)(1) 2, 3
21 U.S.C. 841(b) 44
21 U.S.C. 844(a) 44
21 U.S.C. 848(a) 23
28 U.S.C. 991(a) 40
28 U.S.C. 1254(1) 1
40 U.S.C. 13j 15
40 U.S.C. 193f(a)(1)(B) 15
Ala. Code (1994):
§ 13A-5-6(a)(4) 23
§ 13A-5-6(a)(5) 23
§ 13A-12-231 24
Alaska Stat. (Lexis 2000):
§ 12.55.125(a) 24
§ 12.55.125(b) 24
D.C. Code Ann. (2001):
§ 22-4502(a)(2) 24
§ 22-4502(c) 24
Del. Code Ann. tit. 16, § 4751(d) (1995) 24
Fla. Stat. Ann. (West 2000 & Supp. 2002):
§ 775.087(2)(a)(2) 24
§ 775.087(2)(a)(3) 24
Minn. Stat. Ann. § 609.11 (1987 & Supp. 2002) 24
Mo. Ann. Stat. § 558.018 (West 1999) 24
N.D. Cent. Code § 12.1-32-02.1 (1997 & Supp. 2001) 24
N.J. Stat. Ann. § 2C:43-6(g) (West 1995) 24
2 N.Y. Rev. Stat. (1829):
§ 63, at 679 34
§ 8.2, at 699 34
18 Pa. Cons. Stat. Ann. (West 2000):
§ 6314 24
§ 7508 24
42 Pa. Cons. Stat. Ann. § 9712(a) (West 1998) 24
Fed. R. Crim. P. 32(c) 30

Rules—Continued: Page

United States Sentencing Guidelines:
§ 1B1.1, Comment. (n1(c)) 16
§ 2A2.2(b)(2)(A) 14
§ 2A2.2(b)(2)(C) 14
§ 2B3.2(b)(3)(A)(i) 14
§ 2B3.2(b)(3)(A)(iii) 14
§ 2D1.1(c)(16) 3
§ 2K2.4(a)(2) 4
§ 3D1.1(b) 3
§ 5C1.2 ..... 40, 41
§ 5G1.1 ..... 39, 40
§ 5G1.2(a) 3
§ 5K1.1 41
§ 5K2.6 14
Ch. 1, Pt. A(4)(b) 42

Miscellaneous:

American Friends Service Committee, *Struggle for Justice* (1971) 23
1 J. Bishop, *Law of Criminal Procedure* (2d ed. 1872) 34, 35
A. Campbell, *Law of Sentencing* (2d ed. 1991) 22, 23, 25
P. Hoffman & M. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89 (1978) 23
H.R. 424, 105th Cong., 2d Sess. (1998) 16-17
N. King & S. Klein, *Essential Elements*, 54 Vanderbilt L. Rev. 1467 (2001) 32
A. Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775 (1999) 26
G. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61 (1993) 23
Report of the Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976) 13-14, 22, 23
S. Shane-DuBow, et al., *Sentencing Reform in the United States: History, Content, and Effect* (1985) 23

Miscellaneous—Continued: Page

K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998) 22, 23
United States Sentencing Comm'n, *2000 Sourcebook of Federal Sentencing Statistics* 51 42

In the Supreme Court of the United States

No. 00-10666

WILLIAM JOSEPH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 269-282) is reported at 243 F.3d 806.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2001. The petition for a writ of certiorari was filed on June 18, 2001, and was granted on December 10, 2001, limited to the question specified by the Court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-3a.

STATEMENT

After a plea of guilty and a bench trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of distributing marijuana, in violation of 21 U.S.C. 841(a)(1), and of carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (1994 & Supp. V 1999). He was sentenced to time served (two days of imprisonment) on the distribution offense and to seven years of imprisonment on the firearm offense, to be followed by concurrent terms of three years of supervised release. He was also fined $3000, and ordered to pay a $200 special assessment. J.A. 255-266. The court of appeals affirmed petitioner's sentence. J.A. 269-282.

1. On April 29, 1999, an undercover law enforcement officer visited petitioner's pawn shop and bought an ounce of marijuana from petitioner. J.A. 41-47, 270; Presentence Investigation Report (PSR) ¶ 5. The officer returned the next day and bought an additional 114 grams (approximately four ounces) of marijuana. J.A. 55-56, 270. During both sales, petitioner carried a 9mm Taurus handgun in an unconcealed hip holster. J.A. 41, 55, 271. As the initial sale was concluding, the officer commented on the gun, and petitioner removed it from its holster. J.A. 49. Petitioner told the officer that it "was an outlawed firearm because it had a high-capacity magazine." J.A. 49, 61, 271. Petitioner showed the officer the ammunition and said that his homemade bullets could pierce a police officer's armored jacket. J.A. 49-50, 60-61, 271.

2. In August 1999, a federal grand jury in the Middle District of North Carolina returned a superseding indictment charging petitioner with two counts of distribution of marijuana, in violation of 21 U.S.C. 841(a)(1), and two counts of carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (1994 & Supp. V 1999). J.A. 4-6. Each of the firearm counts alleged that petitioner, "during and in relation to a drug trafficking crime * * * , that is, distribution of marijuana, * * * did knowingly carry a firearm, that is, a 9mm Taurus semiautomatic pistol." J.A. 4, 5. Petitioner pleaded guilty to one marijuana distribution charge, and the court found him guilty of the associated firearm charge after a bench trial. J.A. 22, 164, 271. The other two counts were dismissed on the government's motion. J.A. 22-23, 271.

Under the United States Sentencing Guidelines, petitioner's sentences for the distribution count and for the firearm count were determined independently, because Section 924(c)(1) requires a mandatory consecutive sentence on the firearm count. See 18 U.S.C. 924(c)(1) (1994 & Supp. V 1999); Guidelines §§ 3D1.1(b), 5G1.2(a); PSR ¶ 15. The PSR determined that petitioner was responsible for the equivalent of 534 grams of marijuana, which resulted in a base offense level of eight for the distribution count. PSR ¶¶ 12, 16; see Guidelines § 2D1.1(c)(16).[1] That offense level, together with petitioner's criminal history category of I, yielded an applicable Guidelines sentencing range for the distribution count of zero to six months of imprisonment. PSR

[1] The PSR found that petitioner was responsible for marijuana, opium, and diazepam that he sold on occasions other than the offense of conviction, in addition to the 114 grams of marijuana involved in that offense. PSR ¶¶ 4-10.

¶ 42. Under Guidelines § 2K2.4(a)(2), petitioner's sentence for the firearm count was "the minimum term of imprisonment required by statute," which the PSR indicated was seven years of imprisonment. PSR ¶ 41. Section 924(c)(1)(A)(i) provides for a minimum sentence of five years (and an implied maximum sentence of life imprisonment) for any person who uses or carries a firearm during and in relation to a drug-trafficking crime or who possesses a firearm in furtherance of any such crime. 18 U.S.C. 924(c)(1)(A)(i) (1994 & Supp. V 1999). Section 924(c)(1)(A)(ii) provides that the minimum sentence shall be not less than seven years "if the firearm is brandished." 18 U.S.C. 924(c)(1)(A)(ii) (1994 & Supp. V 1999).

At sentencing, the district court rejected petitioner's arguments that he should be subject to a five-year, rather than a seven-year, minimum sentence on the firearm count. Petitioner argued that his display of the gun did not constitute "brandish[ing]" within the meaning of Section 924(c)(1)(A)(ii). J.A. 199-202, 212-233. Petitioner also argued that brandishing is, as matter of statutory construction, an element of a separate offense, which the government was required to, but did not, allege in the indictment and prove beyond a reasonable doubt at trial. J.A. 202-205, 222. In determining whether petitioner "brandished" the firearm, the district court stated that it would not consider petitioner's "conversation about the gun * * * and the bullets" when petitioner showed the weapon to the officer. J.A. 221. It also noted that brandishing includes "carrying an exposed weapon during the [drug] transaction." J.A. 233. Applying that definition, the court found that, although it was a "close question," petitioner's conduct constituted brandishing under Section 924(c) because petitioner carried the gun openly

during drug transactions "to intimidate people * * * during his illegal business." J.A. 225-227. The court also observed that, "considering all of the aspects of this case," "a sentence of seven years is appropriate." J.A. 247. Although the court declined to say definitively that it would reimpose that sentence if petitioner's arguments on brandishing succeeded on appeal, the court made clear that it might do so. See J.A. 244-247, 274.

3. The court of appeals affirmed petitioner's sentence. J.A. 269-282. The court rejected petitioner's renewed argument that, as a matter of statutory construction, brandishing is an element of an aggravated offense defined by Section 924(c)(1)(A)(ii), and that brandishing must therefore be charged in the indictment and proved at trial beyond a reasonable doubt before it may form the basis for a mandatory minimum sentence. J.A. 270, 272-281. The court concluded, based on its "[e]xamination of the statutory language, structure, context, and history," that "'brandished' is a sentencing factor, not an element of the offense." J.A. 270.

The court of appeals also rejected petitioner's claim that the district court's imposition of a seven-year mandatory minimum sentence was unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). J.A. 273-276. In *Apprendi*, which was decided while petitioner's appeal was pending, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The court of appeals held that *Apprendi* does not apply to petitioner's case because, under Section 924(c)(1)(A)(ii), a finding of

brandishing only increases the mandatory minimum sentence and does not "increase[] the penalty . . . beyond the prescribed statutory maximum." J.A. 273. The court of appeals concluded that the district court's treatment of brandishing as a sentencing factor that need not be charged in the indictment or proved beyond a reasonable doubt at trial was constitutional under *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), because Section 924(c)(1)(A)(ii) "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." J.A. 273 (quoting *McMillan*, 477 U.S. at 87-88).

SUMMARY OF ARGUMENT

I. As a matter of statutory interpretation, Section 924(c)(1)(A) makes "brandishing" a sentencing factor, not an element of the offense. The structure of Section 924(c)(1)(A) suggests that conclusion, by creating a single offense of using or carrying a firearm during and in relation to a drug trafficking crime followed by three numbered subsections that increase the minimum sentence, within the maximum of life imprisonment, based on the manner in which the offense is committed. As the Court noted in *Jones* v. *United States*, 526 U.S. 227 (1999), such a structure has the look of a single offense, with three separate sentencing provisions.

The Court in *Jones* went on to find that the carjacking offense at issue in that case was better construed to create elements rather than sentencing factors, but the pivotal considerations in *Jones* are absent here. Unlike the carjacking statute, the sentencing provisions in Section 924(c)(1)(A) do not raise the maximum, but only increase the minimum; they are activated by facts ("brandishing" and "discharging") that only incrementally enhance the harm in injecting a gun into a drug or

violent crime; and the mandatory increases themselves (*i.e.*, from five to seven or ten years) are not steep. The *Jones* Court relied heavily on the traditional treatment of the factors at issue there (bodily injury, death) as elements in other federal statutes. Here, no other relevant federal statute makes "brandishing" or "discharging" an element.

In adopting an "elements" interpretation, *Jones* placed weight on the doctrine that statutes should be interpreted to avoid serious constitutional questions. In this case, there is no ambiguity that would justify resort to that doctrine. And the constitutionality of a statute that raises the minimum sentence within the range already available to the sentencing judge is established by *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). Congress was entitled to rely on that precedent in framing Section 924(c)(1)(A).

II. The Constitution does not require that "brandishing" be treated as an offense element that must be charged in the indictment and proved beyond a reasonable doubt. In *McMillan*, the Court upheld the constitutionality of a state statute in which the mandatory minimum sentence was increased by a judge's finding by a preponderance of the evidence that a defendant had a visible firearm. That holding is correct, and it is not called into question by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

Legislatures may legitimately decide that judicial discretion in sentencing should be controlled by dictating the precise weight that courts should accord to particular sentencing factors within the authorized range. Legislatures may also validly conclude that assigning the determination of those factors to the judge, rather than the jury, furthers significant interests. Judicial determination of sentencing factors

enables effective appellate review; avoids the complications of submitting multiple findings to grand and petit juries; and prevents the unfairness that may result when a defendant is compelled at trial to contest both the commission of the crime as well as the way in which he committed the crime.

Apprendi's constitutional principles are not undermined by mandatory minimum sentencing provisions. *Apprendi*'s rule—that findings by a court, other than recidivism, cannot increase the maximum statutory sentence—is designed to prevent erosion of the Fifth and Sixth Amendment rights to a jury verdict beyond a reasonable doubt. But mandatory minimum sentencing provisions do not erode or circumvent those rights. Rather, they restrict judicial discretion within the existing range. The jury verdict still determines the facts that establish the maximum available sentence.

Historical sentencing practices afford no basis for declaring mandatory minimum sentencing provisions to be unconstitutional. And policy considerations favor preserving legislative flexibility to enact such provisions. *Apprendi* itself provides substantial protection against any efforts to evade the jury trial and reasonable-doubt requirements. An extension of *Apprendi* to findings *within* the authorized range would only cast a potential constitutional cloud over legislative efforts to reform sentencing.

Finally, whether or not this Court would agree with *McMillan* today, principles of stare decisis weigh heavily against overruling it. Legislatures have relied on this Court's constitutional ruling in *McMillan* for 16 years. That decision should be reaffirmed.

ARGUMENT

I. SECTION 924(c)(1)(A) DEFINES A SINGLE FEDERAL CRIME WITH THREE SENTENCING PROVISIONS

Within broad constitutional limits, "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994). In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that other than a prior conviction, a factor that increases the *maximum* statutory sentence must be treated as an element for constitutional purposes. In *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986), the Court held that a factor that increases a mandatory *minimum* sentence need not be treated as an element. Within those guidelines, whether a particular factor in a federal criminal statute is an offense element or a sentencing factor is dictated primarily by congressional intent, as discerned from the "language, structure, subject matter, context, and history" of the provision. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998).

Section 924(c)(1)(A) increases the mandatory minimum sentence for using or carrying a firearm during and in relation to a drug trafficking offense when the firearm is brandished or discharged. Petitioner contends (Pet. 6) that this Court's decision in *Jones* v. *United States*, 526 U.S. 227 (1999), construed an "indistinguishable" statute to create elements, and so the same conclusion must follow here with respect to brandishing and discharging. *Jones*, however, reached its holding where the statutory findings raised the *maximum* sentence; where the findings duplicated factors that are made elements in other federal statutes;

and where a sentencing-factor interpretation would have created a serious constitutional question, which the Court avoided "out of respect for Congress, which we assume legislates in the light of constitutional limitations." 526 U.S. at 239-240, 251-252. Here, in contrast, the factors at issue raise only the *minimum* sentence, they are classic matters for sentencing, and they appear in a statutory scheme enacted in light of this Court's decision in *McMillan*, which *approves* the constitutionality of a sentencing-factor approach for mandatory minimums. *Jones* does not control this case, and the relevant evidence supports the court of appeals' conclusion that "brandishing," as a matter of statutory construction, "sets forth a sentencing factor that need not be charged in the indictment." J.A. 281.

A. Section 924(c)(1)(A)'s Language And Structure Indicate That Brandishing And Discharging Are Sentencing Factors

Section 924(c)(1)(A) begins with a principal paragraph that defines, as relevant here, "two distinct conduct elements— * * * the 'using and carrying' of a gun and the commission of a [predicate crime]." *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (interpreting similar language in prior version of Section 924(c)(1)); see *Castillo* v. *United States*, 530 U.S. 120, 124 (2000) (same). The paragraph concludes with a phrase using the word "shall," followed by a subsection stating that the offense is punishable by "a term of imprisonment of not less than 5 years," and two additional subsections that raise the minimum sentence when the gun was "brandished" or "discharged." That structure reflects Congress's intent to define a single offense—using or carrying a firearm during and in relation to a drug trafficking crime (or a crime of violence)—

punishable by life in prison, with mandatory minimum sentences that vary in severity depending on the way in which the offense is carried out.

This Court noted in *Jones* v. *United States*, 526 U.S. at 232, when describing the federal carjacking statute, 18 U.S.C. 2119, that such a structure on its face "suggest[s] that the numbered subsections are only sentencing provisions." See also *Castillo*, 530 U.S. at 125 (in *Jones*, the Court noted that "the structure of the carjacking statute—a 'principal paragraph' followed by 'numbered subsections'—makes it 'look' as though the statute sets forth sentencing factors"). That impression is reinforced here by the fact that the maximum for *any* violation of Section 924(c) is always life imprisonment. As the court of appeals explained, the "brandishing" and "discharge" subsections do not increase the maximum sentence, but "operate[] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of [brandishing] a firearm." J.A. 273 (quoting *McMillan*, 477 U.S. at 87-88).

The Court in *Jones* discounted the initial impression conveyed by the structure of the carjacking statute because the additional facts in the subparagraphs of Section 2119 ("injury, death") not only triggered "steeply higher penalties," but also "seem[ed] quite as important as the elements in the principal paragraph." 526 U.S. at 233. In Section 924(c), however, the basic evil is addressed in the principal paragraph. When Congress passed Section 924(c), "it was no doubt aware that drugs and guns are a dangerous combination," which "creates a grave possibility of violence and death," whether or not the gun is deployed as a weapon. *Smith* v. *United States*, 508 U.S. 223, 240 (1993). The acts of "brandishing" and "discharging" do not pose

qualitatively different dangers from the underlying prohibited conduct; they merely magnify the inherent threat of violence that is always present in the volatile mixture of guns and drugs.[2]

Furthermore, the findings under Section 924(c) do not result in "steeply higher penalties." *Jones*, 526 U.S. at 233. The maximum sentence for carjacking increases from 15 years of imprisonment to 25 years if the carjacking results in serious injury, and to life imprisonment if it results in death. See also *Castillo*, 530 U.S. at 131 (taking into account added severity of a sentence increase from five to ten years for use of a short-barreled gun and to thirty years for use of a machinegun). Here, by contrast, *all* violations of Section 924(c) are punishable by life imprisonment. A finding that the firearm was brandished increases the minimum sentence by two years—from five years to seven—and a finding that the firearm was discharged increases the minimum three more years—to ten years. Those increases are not steep and do not affect the "available penalty" at all: a defendant may be sentenced to seven, ten, or many more years in prison without a finding that he brandished or discharged a firearm. J.A. 281.

In *Jones*, even taking account of the nature and sentencing consequences of "serious bodily injury" and "death" under the carjacking statute, and considering other structural features of that provision, the Court still found that "[t]he text alone does not justify any

[2] Unlike the carjacking statute, Congress addressed the *harms* resulting from a violation of Section 924(c) in a separate provision. 18 U.S.C. 924(j) (Supp. V 1999) ("[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm" shall be punished for murder or manslaughter, depending on the nature of the killing).

confident inference" about congressional intent. 526 U.S. at 234. Here, in contrast, the structure of Section 924(c) conveys a strong first impression that "brandishing" and "discharge" are sentencing factors, and the context reinforces that impression. As discussed below, other relevant principles of statutory construction confirm that interpretation.

B. Brandishing And Discharging A Firearm Are Traditional Sentencing Factors

In *Jones*, the Court stated that "[i]f a given statute is unclear about treating * * * a fact as element or penalty aggravator, it makes sense to look at what other statutes have done." 526 U.S. at 234. For the carjacking statute, that inquiry revealed that Congress had frequently treated bodily injury and death as elements of various crimes. *Id.* at 234-235; see also *Castillo*, 530 U.S. at 126-127 (examining federal statutes making type of weapon an offense element). Here, Congress's traditional treatment of brandishing and discharging supports the conclusion that they are sentencing factors. "Traditional sentencing factors often involve * * * special features of the manner in which a basic crime was carried out." *Castillo*, 530 U.S. at 126. Both brandishing and discharging are ways of carrying out the basic crime of using or carrying a firearm during and in relation to a drug trafficking crime or crime of violence.

The Court in *Castillo* specifically stated that the fact "that the defendant * * * brandished a gun" is a traditional sentencing factor. 530 U.S. at 126. That observation is confirmed by a wide variety of sources. See *McMillan*, 477 U.S. at 90-91 ("visible possession" of firearm is a traditional sentencing consideration); Report of the Twentieth Century Fund Task Force

on Criminal Sentencing (Task Force Report), *Fair and Certain Punishment* 57 (1976) ("brandish[ing] a weapon" is factor affecting the appropriate sentence for the crime of burglary); Pub. L. No. 104-208, § 203(e)(2)(E)(ii), 110 Stat. 3009-567 (1996) (directing Sentencing Commission to amend Sentencing Guidelines for alien smuggling to "impose an appropriate sentencing enhancement on a defendant who * * * brandishes a firearm"); Guidelines § 2A2.2(b)(2)(C) (brandishing a firearm increases offense level for aggravated assault); *id.* § 2B3.2(b)(3)(A)(iii) (same for extortion). The same is true of discharging a firearm. *Id.* § 2A2.2(b)(2)(A) (discharging a firearm increases offense level for aggravated assault); *id.* § 2B3.2(b)(3)(A)(i) (same for extortion); *id.* § 5K2.6 ("discharge of a firearm might warrant a substantial sentence increase").

Against that background, there is no evidence to justify treating brandishing and discharging as "elements" in Section 924(c). No federal statute defines "brandishing" a firearm as a separate offense or element of an offense.[3] Petitioner cites (Br. 13) four

[3] The only provision petitioner cites (Br. 13 n.5) as evidence that "Congress has traditionally treated brandishing as an element of the offense" is the definition of the predicate offense of "assault with intent to commit rape" under the federal "three strikes" statute, which does not make brandishing the element of any federal offense. See 18 U.S.C. 3559(c)(2)(A) and (2)(F)(i) (1994 & Supp. V 1999). To the extent that Section 3559(c) is relevant at all to the question in this case, a more pertinent provision is Section 3559(c)(2)(D), which defines the predicate offense of "firearms use" as "an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon." That definition indicates that Congress did not construe the elements "described in section 924(c)" to include brandishing or discharging.

statutes that make it a federal offense to "discharge" a firearm in various protected locations, but none bears any resemblance in language or structure to Section 924(c)(1)(A).[4] Those provisions—which use traditional offense-defining language and do not separate "discharge" from other elements by the word "shall" or numbered subsections—demonstrate only that Congress knows how to make discharging an offense element when it wishes.

Petitioner also cites (Br. 13-14; see Pet. App. E, F) state statutes that treat brandishing and discharging as offense elements. Although in *Jones* the Court relied in part on state robbery statutes, it also noted that "state practice is not * * * direct authority for reading" a federal statute, 526 U.S. at 237, and it considered the state statutes only to confirm its conclusion (based on examination of federal statutes) that, "in treating serious bodily injury as an element, Congress would have been treading a well-worn path." *Ibid.* That some "States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system." *McMillan*, 477 U.S. at 90. In the absence of directly relevant federal statutes, there is no reason to assume that Congress followed the practice of those States when it enacted Section 924(c)(1)(A).

Amici Cato Institute et al., claim that brandishing is a "typical * * * crime in Anglo-American history," but they acknowledge that the common-law offenses of

[4] See 2 U.S.C. 167d ("It shall be unlawful to discharge any firearm" at the Library of Congress.); 18 U.S.C. 922q(3)(A) (1994 & Supp. V 1999) ("it shall be unlawful for any person * * * to discharge * * * a firearm" in a school zone); 40 U.S.C. 13j ("It shall be unlawful to discharge any firearm" in the Supreme Court building.); 40 U.S.C. 193f(a)(1)(B) ("It shall be unlawful for any person * * * to discharge any firearm" in United States Capitol.).

"affray" and "carrying arms 'malo anime'" on which they rely involved fighting in public places or carrying firearms with the intent to commit violent crimes. Br. 24-25 n.7. Brandishing a firearm was not an element of those offenses; it was only one way "in which [the] basic crime [could be] carried out." *Castillo*, 530 U.S. at 126.[5]

C. The Legislative History of Section 924(c) Confirms That Brandishing And Discharging Are Sentencing Factors

The evolution of Section 924(c) also suggests that Congress intended brandishing and discharging to be sentencing factors. As the court of appeals explained (J.A. 279-280), the bill initially passed by the House of Representatives deleted the "uses or carries" language from the opening paragraph of Section 924(c)(1) and added three subsections that provided for escalating fixed sentences for possessing, brandishing, or discharging a firearm. H.R. 424, 105th Cong., 2d Sess. (1998).[6]

[5] Amici also argue (Cato Br. 17, 36) that the definition of "brandish" in Section 924(c)(4), which requires that the defendant "display all or part of the firearm" or "otherwise make the presence of the firearm known to another person, in order to intimidate that person," suggests that brandishing includes "specific intent" and therefore Congress must have meant it to be an element. The inclusion of an identical definition of brandishing in the Sentencing Guidelines, see Guidelines § 1B1.1, comment. (n.1(c)), makes clear that Congress's use of the phrase "in order to intimidate" does not mean that brandishing is necessarily an offense element.

[6] As passed by the House, H.R. 424 provided:

> (1) A person who, during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States—
>
> (A) possesses a firearm in furtherance of the crime, shall * * * be sentenced to imprisonment for 10 years;
>
> (B) brandishes a firearm, shall * * * be sentenced to imprisonment for 15 years; or
>
> (C) discharges a firearm, shall * * * be sentenced to imprisonment for 20 years.

The statute ultimately enacted is quite different. It retains the "uses or carries" language in the principal paragraph, while adding an additional prohibition on possessing a firearm in furtherance of the predicate offenses. The principal paragraph is followed by three subsidiary clauses that relate to sentencing. Unlike the initial House bill, the statute as enacted shows Congress's intent to define the offense in the principal paragraph and then to provide for minimum sentences that increase in severity where the offense involves more dangerous conduct. See J.A. 279 ("In the final bill, however, Congress decided not to include brandishing or discharging as actus reus elements of the offenses proscribed in the initial principal paragraph.").

Petitioner's citations (Br. 20-22) to the legislative history refer primarily to the bill initially passed by the House, which differed in critical respects from the statute ultimately passed. In addition, the citations do not directly discuss "the issue of offense elements versus sentencing factors" and are therefore of little significance in resolving that issue. *Jones*, 526 U.S. at 239. In any event, statements by members of Congress referring to "mandatory minimum sentences" (see Pet. Br. 21-22) do not support petitioner's reading of Section 924(c) but instead "indicate[] that Congress viewed the subsections as penalty enhancements." *United States*

v. *Barton*, 257 F.3d 433, 443 (5th Cir. 2001), cert. denied, 122 S. Ct. 905 (2002).

Asserting that "under the earlier version of § 924(c)(1), any type of use, including brandishing and discharging, was an element of the offense," petitioner argues (Br. 15-16) that "the legislative history gives no indication that Congress intended to convert brandishing and discharging from offense elements to mere sentencing factors." But brandishing and discharging were never distinct "elements" of Section 924(c). In *Bailey* v. *United States*, 516 U.S. 137, 148 (1995), the Court defined "use" under the former version of Section 924(c)(1) to "include[]" brandishing or firing a firearm. The statutory element at issue, however, was "use." See *Rodriguez-Moreno*, 526 U.S. at 280. Brandishing and discharging were merely two of many ways (not specified in the statute) in which a defendant could "use" a firearm. See *Bailey*, 516 U.S. at 148 (in addition to brandishing and firing, "use" also includes "displaying, bartering, [or] striking with" a firearm). There is therefore no support in the evolution of Section 924(c) for finding brandishing and discharging to be anything other than sentencing factors within the already-available range. *McMillan*, 477 U.S. at 87-88.

D. Neither The Rule Of Lenity Nor The Doctrine Of Constitutional Doubt Applies Here

Petitioner's reliance (Br. 24-25) on the rule of lenity is misplaced. The rule of lenity applies only if there is such a "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138, 139 (1998) (internal quotation marks and ellipsis omitted). As shown above, the

language, structure, subject matter, and history of Section 924(c) reveal Congress's intention to define a single crime of using or carrying a firearm, with three alternative statutory minimum sentences depending on the manner in which the offense is committed. The rule of lenity accordingly has no application.

Petitioner also argues that brandishing and discharging must be treated as offense elements because a contrary construction of Section 924(c)(1)(A) "would raise grave and doubtful questions about the statute's constitutionality." Pet. Br. 25-26. Like the rule of lenity, however, the "canon of constitutional avoidance has no application in the absence of statutory ambiguity." *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001); see *Almendarez-Torres*, 523 U.S. at 238. Equally important, there is no grave doubt under current law about the constitutionality of construing brandishing and discharging to be sentencing factors. In *Jones*, the Court found that its cases suggested a constitutional principle (later adopted in *Apprendi*) that facts that raise the *maximum* statutory sentence must be alleged in an indictment and proved to the jury beyond a reasonable doubt. *Jones*, 526 U.S. at 243 n.6; *Apprendi*, 530 U.S. at 476. But the sentencing-factor interpretation of Section 924(c)'s mandatory *minimum* provisions is constitutional under this Court's holding in *McMillan*.

Petitioner erroneously contends (Br. 26) that the canon of constitutional doubt still applies because *Apprendi* casts doubt on the continued validity of *McMillan*. But *Apprendi* did not overrule *McMillan*, 530 U.S. at 487 n.13. And when Congress enacted the amendments to Section 924(c), see Pub. L. No. 105-386, 112 Stat. 3469 (1998), it was entitled to rely on *McMillan*'s express constitutional holding in making

brandishing and discharging sentencing factors. There is therefore no reason for this Court to assume that Congress would have sought to avoid the constitutional question that petitioner now raises.

II. THE CONSTITUTION DOES NOT REQUIRE THAT ANY FACT THAT INCREASES A DEFENDANT'S STATUTORY MANDATORY MINIMUM SENTENCE BE ALLEGED IN THE INDICTMENT AND PROVED BEYOND A REASONABLE DOUBT AT TRIAL

In *McMillan*, this Court upheld the constitutionality of a sentencing provision under which a person convicted of a specified felony was subject to a mandatory minimum penalty of five years of imprisonment if the sentencing judge found, by a preponderance of the evidence, that the person visibly possessed a firearm while committing the offense. 477 U.S. at 80-94. The Court held that due process did not require the State to treat visible possession as an element of the offense or to prove its existence beyond a reasonable doubt. *Id.* at 84-93. The Court also held that the Sixth Amendment did not require that visible possession be found by the jury at trial. *Id.* at 93. The Court explained that the provision "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.* at 87-88.

Petitioner suggests (Br. 7, 29) that *Apprendi* effectively overruled *McMillan* because the *Apprendi* opinion cited with approval earlier opinions of some Justices referring to "facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," see 530 U.S. at 490 (citing *Jones*, 526 U.S. at 253 (Scalia, J., concurring)), or "facts that increase the prescribed range of penalties to which a criminal defendant is exposed," *ibid.* (quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring)). While the Court in *Apprendi* "limit[ed]" *McMillan*'s holding to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," it expressly declined to reconsider *McMillan*. 530 U.S. at 487 n.13. The Court's opinion in *Apprendi* repeatedly states that its holding applies to facts that increase the potential penalty beyond the prescribed statutory maximum. *Id.* at 469, 476, 490, 494 & n.19, 495. With respect to the different issue here, *McMillan* correctly determined that mandatory minimum sentencing provisions are constitutional, and *McMillan*'s holding should be reaffirmed.

A. Mandatory Minimum Sentencing Provisions Serve Legitimate Legislative Purposes

1. *The Legislature's Authority Over Sentencing Includes Specification Of Mandatory Minimum Penalties*

Over time, sentencing practices in this country have changed with shifting philosophies about the appropriate function of punishment and the institutions best equipped to set it for a given crime. Early in the Nation's history, legislatures generally favored fixed or mandatory sentences. Then, Congress and the state legislatures committed sentencing primarily to judges, entrusting them with discretion to determine the appropriate sentence within broad statutory limits. The legislatures in such regimes did not typically provide detailed criteria, or criteria of any kind, to restrict the

sentencing judge's exercise of that discretion. Later, with a shift in sentencing philosophy in favor of rehabilitation, some legislatures adopted indeterminate sentencing schemes in which the actual period of imprisonment was left largely to parole boards and other officials outside of the courts.[7]

"But more recently the pendulum has swung back." *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991). Legislatures, dissatisfied with regimes that left unguided discretion either to judges or parole boards and doubtful about the rehabilitative potential of imprisonment, have increasingly enacted provisions that "provided for very precise calibration of sentences, depending upon a number of factors." *Ibid.* By such provisions, the legislature exercised its paramount role to establish sentencing policy. *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989) ("the scope of judicial discretion with respect to a sentence is subject to congressional control").

The recent legislative efforts to recapture control over the sentencing process largely respond to significant variations in the sentences imposed on similarly situated defendants under the indeterminate sentencing regime. In the federal system, the disparities were compounded by the complete absence, as a practical matter, of appellate review of a sentence within statutory limits. *Dorszynski* v. *United States*, 418 U.S. 424,

[7] The history of sentencing practices in this country is described in detail in *Mistretta* v. *United States*, 488 U.S. 361, 364-365 (1989); *Bullington* v. *Missouri*, 451 U.S. 430, 444 & n.16 (1981); *United States* v. *Grayson*, 438 U.S. 41, 45-48 (1978); *Williams* v. *New York*, 337 U.S. 241, 246, 247-249 (1949); Task Force Report 79-102; K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9-37 (1998); A. Campbell, *Law of Sentencing* §§ 1:2, 1:3 (2d ed. 1991).

431 (1974). Beginning in the 1970s, those disparities became the subject of increasing criticism. See A. Campbell, *Law of Sentencing* § 1:3, at 9-10 (2d ed. 1991); P. Hoffman & M. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89 (1978); *e.g.*, Task Force Report 3-9; American Friends Service Committee, *Struggle for Justice* (1971). As a result, Congress and most States reexamined their sentencing systems and enacted a variety of sentencing reforms.

The most prominent effort was the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, which created the United States Sentencing Commission and Guidelines. But another popular sentencing reform was increased use of mandatory minimum prison terms. See Campbell, *supra*, § 1:3, at 13; *id.* §§ 4:2, 4:5; Task Force Report 16; K. Stith & J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts*, 123 (1998). These laws required mandatory minimum prison terms based on specified aggravating factors, such as repeat offender status, use of a firearm or other dangerous weapon during the offense, the particular vulnerability of the victim, and the amount of drugs involved in narcotics offenses. See *id.* at 123, 210 n.38; G. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61, 69, 70-71 & nn.37-48 (1993); S. Shane-DuBow, et al., *Sentencing Reform in the United States: History, Content, and Effect* (1985). Legislatures thus began to use mandatory minimums as a mechanism to regain control over judicial sentencing discretion.[8]

[8] See, *e.g.*, 18 U.S.C. 924(c)(1)(A)(ii) and (iii) (1994 & Supp. V 1999); 21 U.S.C. 848(a); Ala. Code § 13A-5-6(a)(4) and (5) (1994);

As generally formulated, mandatory minimum sentencing systems are an integral aspect of the sentencing process, not of the definition of crimes. The provisions do not expose defendants to any punishment that could not already have been imposed by a sentencing judge exercising unrestricted discretion. When the legislature commits sentencing to the discretion of the courts, it expects that judges will consider a variety of facts in order to calibrate the punishment to the conduct and character of the offender. See *United States* v. *Grayson*, 438 U.S. 41, 46 (1978); *Williams* v. *New York*, 337 U.S. 241 (1949). Those facts can have quite definite consequences for a defendant, as in *Williams* where the judge's consideration of the defendant's prior record led him to reject the jury's recommendation of life imprisonment and elevate the defendant's sentence to death. If a particular sentencing judge uniformly imposed a minimum sentence of seven years on defendants who brandished firearms (rather than merely carrying them or using them in a less dangerous way), that practice would not redefine the crime for which the sentences were imposed or require that the fact of brandishing be charged in the indictment and proved at trial beyond a reasonable doubt. Nor would a sentencing factor be transformed into an "element" if sentencing judges, after conducting a survey that revealed that most judges imposed such a minimum sentence, agreed that

---

id. § 13A-12-231 (Supp. 2000); Alaska Stat. § 12.55.125(a) and (b) (Lexis 2000); Del. Code Ann. tit. 16, § 4751(d) (1995); D.C. Code Ann. § 22-4502(a)(2) and (c) (2001); Fla. Stat. Ann. § 775.087(2)(a)(2) and (3) (West 2000 & Supp. 2002); Minn. Stat. Ann. § 609.11 (1987 & Supp. 2002); Mo. Ann. Stat. § 558.018 (West 1999); N.J. Stat. Ann. § 2C:43-6g (West 1995); N.D. Cent. Code § 12.1-32-02.1 (1997 & Supp. 2001); 18 Pa. Cons. Stat. Ann. §§ 6314, 7508 (West 2000); 42 Pa. Cons. Stat. Ann. § 9712(a) (West 1998).

each judge would follow the general practice. See Campbell, *supra*, § 1:3, at 13-14 (discussing experimentation with voluntary sentencing guidelines in the 1970s).

Likewise, when the legislature "simply [takes] one factor that has always been considered by sentencing courts to bear on punishment * * * and dictate[s] the precise weight to be given that factor," it is not creating a new crime, but is providing "additional guidance" to the sentencing court. *McMillan*, 477 U.S. at 89-90, 92. The fact that the sentencing process becomes more transparent and uniform does not transform the consideration of a sentencing factor into an element of a distinct offense. See *Witte* v. *United States*, 515 U.S. 389, 401-402 (1995).

2. The Legislature May Reasonably Assign Mandatory Sentencing Factors To The Courts

There are valid policy reasons for a legislature to require uniform treatment of a particular sentencing factor without also treating that fact as an element of the offense that must be alleged in the indictment and found by the jury at trial.

First, because fact-finding by a jury is less susceptible to appellate review than fact-finding by a court, requiring jury fact-finding could undermine the legislature's goal of increased control over the punishment process. Effective appellate review of jury determinations presents practical difficulties because there is normally no way for the jury to place on the record the reasons for its collective decision. See *Chaffin* v. *Stynchecombe*, 412 U.S. 17, 28 n.14 (1973). In addition, under double jeopardy principles, the government may not appeal a jury determination that there is insufficient evidence of a fact that is deemed an element of the

offense. See *United States* v. *Scott*, 437 U.S. 82, 91 (1978). The unavailability of government appeals may be particularly problematic given the evidence that juries may engage in nullification in order to avoid perceived harsh results required by mandatory sentencing provisions. See A. Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, 1783-1784 (1999). But government appeals of judicial sentencing determinations are permissible, and this Court has noted that appellate review "should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980).

Second, a rule that requires that all facts that increase the mandatory minimum punishment be treated as elements of the offense could render indictments unwieldy and could unnecessarily complicate trials. A wide array of facts bears on the appropriate sentence, see, *e.g.*, *Williams*, 337 U.S. at 246, and a legislature might properly determine that any number, or combination, of those facts warrant imposition of a mandatory minimum term. It would strain practicality, and serve no useful purpose, to require that all of those facts, even those that are collateral to guilt, be included in the indictment and proved to a jury at trial.

Finally, requiring jury determinations of facts that bear only on the applicability of mandatory minimum punishment could unnecessarily prejudice defendants. "A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Monge* v. *California*, 524 U.S. 721, 729 (1998); see also *Almendarez-Torres*, 523 U.S. at 234-235. When a fact has no effect other than to limit the sentence that may be imposed *within* the range otherwise specified by the

legislature, "fairness [may] call[] for defining [that] fact as a sentencing factor." *Monge*, 524 U.S. at 729. There is no sufficient reason to subject the government to the burden and expense of bifurcated trials in order to avoid the risk of that unfairness.

B. The Constitutional Values Served by *Apprendi* Do Not Apply To Mandatory Minimum Sentencing Provisions

In *Apprendi*, this Court held, as a matter of constitutional law, that other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The constitutional values that animate *Apprendi* are not infringed by mandatory minimum sentencing provisions.

The rule announced in *Apprendi* protects against legislative circumvention of the Sixth Amendment right to trial by jury, see *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), and the due process requirement of proof beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 364 (1970). *Apprendi*, 530 U.S. at 482-483; see also *Jones*, 526 U.S. at 243. If the legislature could provide for judicial fact-finding by a preponderance of the evidence of facts that increase the *maximum* punishment beyond that authorized by the jury's verdict, then the legislature could diminish the jury's role to one of "low-level gatekeeping," *Jones*, 526 U.S. at 243-244, and evade *Winship*, *id.* at 243. In federal cases, such a rule would also bypass the grand jury's role in finding probable cause.

None of those dangers is presented by a provision increasing the *minimum* punishment within the authorized range. Those provisions merely result in "a specific sentence *within the range* authorized by the

jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 U.S. at 494 n.19. They do not empower the sentencing judge to impose any punishment beyond the term authorized by the jury's verdict. Because facts that increase only the required minimum punishment do not increase the authority of the sentencing judge at the expense of the jury, the legislature's assignment of the finding of those facts to the judge cannot "ero[de] * * * the jury's function" or reduce the jury's role to "low-level gatekeeping" (*Jones*, 526 U.S. at 244). Rather, the jury retains its critical function of "determin[ing] those facts that determine the maximum sentence the law allows," *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring).

a. *Sixth Amendment.* The jury trial right protects "against the corrupt or overzealous prosecutor and against the compliant, biased, and eccentric judge." *Duncan* v. *Louisiana*, 391 U.S. at 156. Prohibiting a judge from determining a mandatory minimum sentencing factor would not protect against either prosecutorial zealousness or judicial misfeasance. A harsh or prejudiced judge can impose a longer sentence within the already-authorized range whether or not the legislature has mandated that result. And an overzealous prosecutor can demand such a sentence, whether or not it is required. Even if a jury were to *reject* the factual predicate for the mandatory increase under the beyond-a-reasonable-doubt standard, the sentencing court would remain free to find the same fact by a preponderance of the evidence and impose the same sentence. See *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence").

b. *Reasonable Doubt.* Proof beyond a reasonable doubt protects the criminal defendant against erroneous deprivations of liberty and impositions of stigma. See *Apprendi*, 530 U.S. at 484; *Winship*, 397 U.S. at 363-364. A requirement of proof beyond a reasonable doubt of facts that require the sentencing judge to impose a minimum punishment would not advance that goal. As noted above, even if those facts are *not* proved beyond a reasonable doubt, the judge can impose the same stigma and deprivation of liberty if the judge finds that the facts have been proved by a preponderance of the evidence. Indeed, the judge can impose the same stigma and deprivation of liberty even if he finds those particular facts have not been proved at all.

A defendant's loss of liberty and stigma of conviction are not heightened "in the same fashion" by a judicial finding that increases the mandatory minimum as by a judicial finding that increases the statutory maximum. Pet. Br. 7, 30-32. Unlike a finding that increases the maximum authorized punishment, a finding that increases only the minimum punishment does not expose the defendant to any loss of liberty or stigma to which he was not already exposed by the jury's verdict.

c. *Grand Jury Clause.* The grand jury clause ensures that a criminal charge is "founded upon reason" and not "dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). But a grand jury cannot prevent oppressive prosecutions by declining to charge a fact that, if found, would increase only the *minimum* punishment provided by statute. The grand jury's failure to charge that fact does not prevent the prosecutor from seeking

the same or greater punishment, even in reliance on that very fact.[9]

In sum, the function of a mandatory minimum sentencing provision is to limit the discretion of the sentencing judge and thereby allow the legislature to retain greater control over the prescription of punishments. The rights to trial by jury, to proof beyond a reasonable doubt, and to a grand jury indictment are not designed to prevent the legislature from limiting the discretion of the sentencing judge. Indeed, *Apprendi* itself limited judicial discretion, by divesting the judge of the power to exceed the statutory maximum sentence authorized by the jury's verdict. The purpose of the constitutional guarantees interpreted in *Apprendi* is to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges. That purpose is not undermined by mandatory minimum sentencing provisions.

2. Petitioner argues (Br. 32-33) that an increase in the mandatory minimum punishment may have a more severe practical impact on the defendant than an increase in the maximum authorized punishment. He

[9] The grand jury clause also ensures that the defendant receives notice of the charge against him. *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985). The defendant, however, does not need notice before trial of an allegation that bears only on a sentence within the authorized range of punishment. And both due process and federal law require that the defendant be notified before the judge makes the sentencing determination of any allegations that, if found, will trigger a mandatory minimum sentence. See *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962) (reasonable notice and opportunity to be heard on a recidivist charge is concomitant to the right to counsel at sentencing); 18 U.S.C. 3552(d) (requiring disclosure of presentence report); Fed. R. Crim. P. 32(c) (requiring sentencing court to verify that defendant and counsel have read and discussed presentence report).

notes that the increase in the minimum deprives the defendant of the opportunity to argue for a sentence at the bottom of the otherwise authorized range, while an increase in the maximum only creates the possibility that the defendant will receive a sentence higher than the previously authorized range. He also makes the related argument (Br. 33-34) that the deprivation of that opportunity alters "rights and entitlements" in a manner that "implicates the core concerns of the due process clause." Those arguments, however, ignore the fact that "the defendant has no substantive right to a particular sentence within the range authorized by statute." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). Although *Apprendi* establishes that a defendant has a constitutional right to a jury finding beyond a reasonable doubt of any fact (other than recidivism) that exposes him to punishment beyond the otherwise applicable statutory maximum, *Apprendi* does not create any right to "the mercy of a tenderhearted judge," 530 U.S. at 498 (Scalia, J., concurring), with unlimited discretion to impose any sentence within that maximum.

C. History Casts No Doubt On The Constitutionality Of Mandatory Minimum Sentencing Factors

McMillan is also fully consistent with historical sentencing practices. The Court concluded in *Apprendi* that the historical evidence "point[s] to a single, consistent conclusion: * * * facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." 530 U.S. at 483 n.10. Notwithstanding petitioner's contrary contention (Br. 35-37), there is no comparable historical basis for according that status to facts that merely restrict the sentencing judge's discre-

tion by requiring a mandatory minimum punishment. Petitioner cannot meet his burden to show that treating those facts as sentencing factors "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 505 U.S. 437, 445-448 (1992); *Patterson* v. *New York*, 432 U.S. 197, 202 (1977).

1. Statutory provisions that require imposition of a minimum sentence without also increasing the statutory maximum did not come into general use until the twentieth century. See N. King & S. Klein, *Essential Elements*, 54 Vanderbilt L. Rev. 1467, 1474-1477 (2001). Therefore, courts in the nineteenth century were not generally "presented with the necessity of deciding whether a fact, other than prior conviction, that triggers a mandatory minimum sentence but not a higher maximum sentence, was an essential ingredient of an offense that must be pled in the indictment and proven to a jury beyond a reasonable doubt." *Id.* at 1474.

None of the decisions on which petitioner relies (Br. 35-36) involved statutes in which a fact increased only the mandatory minimum punishment. Some of the decisions involved facts that increased only the maximum penalty.[10] Others involved facts that increased both the

[10] See *Hobbs* v. *State*, 44 Tex. 353 (1875) (fact that burglary was "effected by force" increased maximum penalty from five to ten years); *Johnson* v. *State*, 55 N.Y. 512 (1874) (fact of prior conviction increased maximum punishment for larceny from five to ten years); *Ritchey* v. *State*, 7 Blackf. 168 (Ind. 1844) (maximum fine for arson was "double the value of the property destroyed"); *Hope* v. *Commonwealth*, 50 Mass. (9 Met.) 134 (1845) (maximum prison term and fine for larceny increased based on greater value of property stolen).

minimum and the maximum.[11] One decision involved a fine that increased in direct proportion to the value of the stolen property.[12] Finally, in one decision, the fact —whether arson occurred in the daytime or at night— did not alter the penalty range, but the court was required to consider the fact in determining the appropriate punishment within the range and to punish arson in the daytime less severely. The court held that this fact was "not one of the ingredients of the crime" and did *not* have to be included in the indictment.[13]

Only one of the cases cited by Justice Thomas in his concurring opinion in *Apprendi* appears to have involved a fact that increased only the minimum penalty. That decision involved a California statute under which the defendant's prior conviction for robbery increased the minimum penalty for his subsequent robbery conviction from one year to ten years. *People* v. *Coleman*, 145 Cal. 609 (1904). A separate California statute required that the fact of the previous conviction, which was charged in the information for the subsequent offense, be found by the jury. See *id.* at 611. The court upheld the constitutionality of that procedure, but it did not hold that any principle of constitutional law required jury determination of the prior conviction. See *id.* at 611-615.

[11] See *Garcia* v. *State*, 19 Tex. Ct. App. 389 (1885) (fact that assault was "made with a bowie-knife or dagger, or in disguise" increased penalty from two to seven years to four to fourteen years); *Lacy* v. *State*, 15 Wis. 13 (1862) (fact that arson involved dwelling house that was lawfully occupied at time of offense increased penalty from three to ten years to seven to fourteen years).

[12] See *Commonwealth* v. *Smith*, 1 Mass. (1 Will.) 245 (1804) (penalty for larceny was "treble damages" based on value of stolen goods).

[13] *Brightwell* v. *State*, 41 Ga. 482 (1871).

Indeed, one decision holds that a fact that raised the minimum (but not the maximum) penalty was *not* an element of the offense. In *People* v. *Raymond*, 96 N.Y. 38 (1884), the statute involved made a prior conviction raise only the mandatory minimum punishment for the second offense, but did not require that the prior offense be charged in the indictment or found by the jury. The court held that the "first offense was not an element of or included in the second." *Ibid.* That case stands in contrast to the New York decision cited by petitioner (Pet. 36), in which the court held that the prior conviction "must be established on the trial" because it resulted in a "more severe penalty." See *Johnson*, 55 N.Y. at 513-514; 2 N.Y. Rev. Stat. 679, § 63 (1829); *id.* at 699, § 8.2. The only way to reconcile the statements in the two cases is that *Raymond* involved an increase in only the minimum penalty while *Johnson* involved an increase in the maximum penalty.[14]

2. Petitioner also relies on a nineteenth-century treatise on criminal procedure, but the statements he cites do not address facts that increase only the mandatory minimum punishment. See Br. 37 (quoting 1 J. Bishop, *Law of Criminal Procedure* §§ 77-84, at 50-53, § 540, at 330 (2d ed. 1872)). To the extent the treatise contains any relevant discussion, it suggests that such facts need not be treated as offense elements. The treatise states that aggravating facts considered by the judge in exercising his sentencing discretion need not be included in the indictment because they "cannot

[14] Although both New York cases (like the California case) involved recidivism—which has a unique constitutional status under *Almendarez-Torres* and *Apprendi*, 530 U.S. at 487-490—that cannot explain why the court concluded only in *Raymond* that recidivism was not an element of the offense.

swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy." Bishop, *supra*, § 85, at 54.

Petitioner relies (Br. 37) on statements suggesting that "every particular thing which enters into the punishment" is an offense element, but those statements apparently use the term "punishment" as shorthand for "maximum punishment." See Bishop, *supra*, at 330; *id.* at 51, 53. Otherwise, they would mean that all statutory mitigating factors and all facts that influence a judge's exercise of his sentencing discretion must be treated as elements. That result would conflict with extensive precedent in addition to *McMillan*, *e.g.*, *Martin* v. *Ohio*, 480 U.S. 228, 233 (1987) (affirmative defense); *Patterson*, 432 U.S. at 201 (mitigating factor); *Williams*, 337 U.S. at 246 (sentencing judge's consideration of uncharged facts), and was disavowed both by the Court in *Apprendi*, see 530 U.S. at 481, 490 n.16, and by the treatise author himself, see Bishop, *supra*, at 54.

Petitioner also is not assisted by the treatise's statement that a defendant may not be subjected to "any punishment * * * in kind differing from, what the law has set down as the penalty for the particular acts alleged" in the indictment. See Pet. Br. 37 (quoting Bishop, *supra*, at 52). The reference to a penalty differing "in kind" does not mean a mandatory minimum sentence. Rather, it means a punishment qualitatively different "in kind"—for example, the death penalty rather than imprisonment. See Bishop, *supra*, at 51 ("If a man is charged with acts to which the law attaches the penalty of imprisonment, and then he is

hung for those acts, he is not punished, he is murdered.").[15]

D. Policy Considerations Do Not Favor Petitioner's Position

1. *Mandatory Minimum Sentencing Provisions Do Not Permit Circumvention Of Apprendi*

Contrary to petitioner's contention (Br. 37-40), the Court need not invalidate mandatory minimum sentencing provisions to prevent legislatures from circumventing the interrelated jury trial and reasonable doubt guarantees. When it decided *McMillan*, the Court recognized the theoretical possibility that a legislature could enact a sentencing provision to "'evade' the command[] of *Winship*." 477 U.S. at 89. The Court concluded, however, that the risk that a hypothetical legislature might adopt a mandatory minimum provision for that purpose was not sufficient to require a categorical rule barring legislatures from enacting such provisions to limit the discretion of sentencing courts. *Id.* at 91 (constitutionality of statutes will "depend on differences of degree" and should be judged on a case-by-case basis).

Petitioner incorrectly argues (Br. 45) that Section 924(c)(1)(A) involves an attempted evasion of *Winship*. That argument is based on the incorrect premise that "brandishing and discharging were treated as offense elements" under the pre-1998 version of Section

[15] Petitioner also cites (Br. 36) a concurring opinion in *United States* v. *Reese*, 92 U.S. 214 (1875), which relies on the Bishop treatise. *Id.* at 232-233 (Clifford, J., concurring in the judgment). That case, however, did not involve the constitutionality of a mandatory minimum sentence, and there is no indication that Justice Clifford's comments were intended to address facts that increase only the required minimum punishment.

924(c)(1). Pet. Br. 46-47. Proof that a defendant brandished (or discharged) a firearm was *not* an element of the offense defined by former Section 924(c)(1). See p. 18, *supra*. Petitioner's claim is particularly unpersuasive because, under Section 924(c)(1)(A)(ii), the fact that the defendant "brandished" the weapon only increases the defendant's minimum sentence by two years.

The *Apprendi* decision significantly reduces the possibility of evasion of constitutional protections through its categorical rule that a legislature may not entrust to the sentencing judge the determination of facts that increase the maximum punishment provided by statute. The Court in *Apprendi* recognized that the rule it adopted did not foreclose every scheme that a creative legislature might theoretically devise in order to circumvent the Constitution's procedural protections. The Court concluded, however, that the *Apprendi* rule, together with "structural democratic constraints," would provide powerful protection. See 530 U.S. at 490 n.16. As the Court recognized, a legislature has a strong disincentive to "raise all statutory maximum sentences to life in prison" (Pet. Br. 38) because that scheme would expose all citizens to greater punishment than the legislature believes is proportional to the conduct that authorizes the punishment. 530 U.S. at 490 n.16. That disincentive discourages attempts to evade *Winship* by widespread use of inflexible or draconian mandatory minimums or other techniques, such as "mitigating" factors.

2. *Overturning Mandatory Minimum Sentencing Provisions Would Undermine Sentencing Reform Efforts*

A ruling rejecting the constitutionality of mandatory minimum sentences has the potential to hamper legislative experimentation with alternative sentencing reforms. Indeed, the consequences would be particularly drastic if the Court were to embrace petitioner's contention (Br. 30 n.13) that the full panoply of trial rights must attach to any fact to which the legislature has given "so much weight that it alone alters the sentencing range." See also Amicus Families Against Mandatory Minimums Foundation (FAMM) (Br. 5) ("[a]ll the distinctive features of the offender's conduct that make it criminal and which, by statute, determine the severity of the wrongdoing, ought to be proved in the same manner"). *Apprendi* did not adopt that proposition, and its acceptance would call into question the established principle that mitigating facts need not be treated as elements of the offense, see *Martin*, 480 U.S. at 233; *Patterson*, 432 U.S. at 201, a principle that the Court expressly reaffirmed in *Apprendi*. See 530 U.S. at 490 n.16; *id.* at 501 (Thomas, J., joined by Scalia, J., concurring). It would also call into question the Federal Sentencing Guidelines.

Like mandatory minimums, the Sentencing Guidelines constrain the discretion of sentencing courts in order to prevent the unfair disparities associated with indeterminate sentencing. See *Mistretta*, 488 U.S. at 365-366. The Guidelines are consistent with *Apprendi* for the same reasons that mandatory minimum sentencing factors are consistent with *Apprendi*. The Guidelines simply constrain the discretion of the sentencing court in imposing punishment within the range otherwise specified by statute and do not increase the

authorized punishment beyond the statutory maximum. See *Edwards* v. *United States*, 523 U.S. 511, 515 (1998) (citing Guidelines § 5G1.1); see also *Apprendi*, 530 U.S. at 497 n.21. The courts of appeals that have addressed the question have uniformly held that the Guidelines are constitutional under the rule adopted in *Apprendi*.[16] But extension of *Apprendi* to mandatory minimum sentencing provisions will spark a new round of litigation and could raise serious questions.

Like mandatory minimums, the sentencing ranges set by the Guidelines operate as legal constraints on the sentencing court. See *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). The district court is allowed, by statute, to depart from the Guidelines only when the court finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). A "sentencing court's use of an invalid departure ground is an incorrect application of the Guidelines" that requires reversal unless a "reviewing court concludes * * * that the error was harmless." *Williams* v. *United States*, 503 U.S. 193, 200, 203 (1992).

---

[16] See, *e.g.*, *United States* v. *Williams*, 235 F.3d 858 (3d Cir. 2000), cert. denied, 122 S. Ct. 49 (2001); *United States* v. *Kinter*, 235 F.3d 192 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 200), cert. denied, 531 U.S. 1177 (2001); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000); *United States* v. *Lewis*, 236 F.3d 948 (8th Cir. 2001); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *United States* v. *Heckard*, 238 F.3d 1222 (10th Cir. 2001); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001).

A decision from this Court prohibiting mandatory minimum provisions unless the defendant is accorded the right to indictment, jury trial, and proof beyond a reasonable doubt would therefore raise questions about the constitutionality of the Guidelines. The Guidelines differ from provisions such as 18 U.S.C. 924(c) in at least two important respects. First, the Guidelines are not enacted by a legislature, but are promulgated by the Sentencing Commission, "an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Thus, the Guidelines are not statutes that "bind or regulate the primary conduct of the public." *Mistretta*, 488 U.S. at 396. And the Guidelines neither require nor permit sentencing judges to depart from statutory maximums. They also permit departure from statutory minimums only as specified by other statutory provisions. See Guidelines §§ 5G1.1; 5C1.2; 18 U.S.C. 3553(e) and (f) (1994 & Supp. V 1999). The Guidelines thus do not "vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties" for crimes. *Mistretta*, 488 U.S. at 396.

Second, statutory mandatory minimum provisions generally remove sentencing courts' discretion to sentence a defendant at the lower end of the otherwise-applicable statutory range. But the Guidelines leave courts with some discretion to depart from the applicable Guidelines range, and decisions to depart are reviewable on appeal only for abuse of discretion. *Koon* v. *United States*, 518 U.S. 81, 92 (1996). These features of the Guidelines differentiate the constitutional question here from any constitutional challenge to the Guidelines.

But this Court has not held that administratively promulgated sentencing guidelines are entirely immune

from *Apprendi* principles, and it has not examined what degree of discretion to depart from the guidelines would be necessary to distinguish them from "mandatory" sentencing provisions. Indeed, in light of the generally binding character of the Federal Sentencing Guidelines, FAMM all but acknowledges (Br. 28-29) that its analysis would render the Guidelines unconstitutional unless the Court were to adopt a "[a] less rigid" interpretation of the Sentencing Reform Act, under which the guidelines were simply "one factor among many to be considered by the court."

The sentencing court's discretion to depart from the Guidelines is an important distinction, but the difference is one of degree. Contrary to petitioner's assertion (Br. 40 n.15), a statutory mandatory minimum does not "eliminate all judicial discretion to depart downward." Rather, as with the Sentencing Guidelines, district courts have discretion to impose a sentence below the mandatory minimum in certain statutorily defined circumstances. See 18 U.S.C. 3553(e) (substantial assistance departures from statutory minimum on a government motion), 18 U.S.C. 3553(f) (safety valve in drug cases); cf. Guidelines § 5K1.1 (substantial assistance departures on a government motion); Guidelines § 5C1.2 (safety valve in drug cases). Accordingly, mandatory minimum provisions are not always "mandatory"; and Sentencing Guidelines provisions do not in all cases permit departure (*i.e.*, a judge cannot depart when a case is within the "heartland" of a guideline, see *Koon*, 518 U.S. at 92-96). Drawing the constitutional line between these types of provisions, *i.e.*, deciding

how much discretion is "enough," will therefore entail close analysis.[17]

Rather than open up those questions, the constitutionality of mandatory minimum provisions should be affirmed. The constitutional tradition in this country accords the legislature broad leeway to decide both how much discretion to give sentencing judges and the mechanism to be used to constrain that discretion (including whether to use an intermediary like the Sentencing Commission). See *Mistretta*, 488 U.S. at 364, 372-373, 381. There is no need for the Court to embark on a path that may call into question legislative reform efforts intended to guide sentencing discretion and diminish unwarranted disparate treatment of similarly situated offenders. A legislative decision to treat as sentencing factors particular facts that increase only the required minimum punishment is consistent with historical tradition and threatens no constitutional values.

---

[17] Petitioner observes (Br. 15 n.15) that "34 percent of all defendants sentenced under the guidelines in 2000 received a sentence lower than the recommended range." But that figure obscures that in 2000, more than one-half of those defendants (17.9%) received departures for substantial assistance. See United States Sentencing Commission, *2000 Sourcebook of Federal Sentencing Statistics* (Sourcebook) 51 (Figure G). A sentencing court may grant such a departure only on a motion by the government; in addition, a similar departure power exists from all *statutory* mandatory minimum provisions. See *Melendez* v. *United States*, 518 U.S. 120 (1996). The percentage of departures made on grounds other than substantial assistance was 17.7%. See Sourcebook at 51 (Figure G) (17% downward, .7% upward); see also U.S.S.G. Ch.1 Pt. A(4)(b) (departures on grounds not mentioned in the Guidelines are expected to be "highly infrequent").

E. Stare Decisis Supports *McMillan*'s Continuing Validity

At stake in this case is not a question of first impression, but a question that this Court resolved 16 years ago in *McMillan*. Petitioner's constitutional claim must therefore overcome the doctrine of stare decisis. Although "*stare decisis* is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). "Whether or not [the Court] would agree with [*McMillan*'s] reasoning" today, "the principles of *stare decisis* weigh heavily against overruling it now." *Ibid.*; see *Hubbard* v. *United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (reasons for disregarding stare decisis must "go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)").

While reliance interests may be diminished with respect to some rules of criminal procedure, see *Payne*, 501 U.S. at 828, stare decisis "has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard*, 514 U.S. at 714 (internal quotation marks omitted); see *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854-855 (1992).

In *Apprendi*, the Court noted "the likelihood that legislative decisions may have been made in reliance on *McMillan*." 530 U.S. at 487 n.13. True to that obser-

vation, Congress and state legislatures have adopted and left in place mandatory minimum sentencing provisions in reliance on the Court's ruling upholding the constitutionality of such provisions. See note 8, *supra*. Other provisions in which Congress raised both the mandatory minimum and the maximum terms were also enacted in the wake of *McMillan*. See Pub. L. No. 104-132, § 708(a), 110 Stat. 1296 (1996) (adding mandatory minimum penalties to 18 U.S.C. 844(f) and (i)); Pub. L. No. 104-208, § 121, 110 Stat. 3009-29 (1996) (codified at 18 U.S.C. 2252A); Pub. L. No. 100-690, § 6371, 102 Stat 4370 (1988) (adding mandatory minimums under 21 U.S.C. 844(a) for serious crack possession); Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 to 3207-4 (1986) (adding mandatory minimum terms under 21 U.S.C. 841(b)). A decision overruling *McMillan* and extending *Apprendi* to mandatory minimums could "require an extensive legislative response" and would call into question thousands of sentences imposed under those provisions. It would also inundate the courts with litigation challenging various determinate-sentencing regimes.

Petitioner offers no compelling justification for the Court to invite those disruptive effects. He argues (Br. 41-44) that the decisions in *Jones* and *Apprendi* "cast serious doubt on the continuing validity of *McMillan*," and that the Court should depart from stare decisis because "further examination of the common law understanding of offense elements * * * has revealed that at common law, facts that changed the sentencing range—maximum or minimum—were regarded as elements of the offense." Those arguments, however, are simply reformulations of petitioner's arguments that *McMillan* was wrongly decided, which—even if it were true—would be insufficient justification to cast it

and stare decisis aside. Adherence to *McMillan* is the sounder course.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

NINA GOODMAN
Attorney

FEBRUARY 2002

APPENDIX

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property without due process of law.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * and to be informed of the nature and cause of the accusation.

3. Section 924(c)(1) and (4) of Title 18, United States Code (1994 & Supp. V 1999), provides:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

> (i) be sentenced to a term of imprisonment of not less than 5 years;

> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

> (i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

> (i) be sentenced to a term of imprisonment of not less than 25 years; and
>
> (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

> (i) a court shall not place on probation any person convicted of a violation of this subsection; and
>
> (ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on

the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * * * *

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

Supreme Court U.S.
FILED
MAR 19 2002
OFFICE OF THE CLERK

(8)

No. 00-10666

In The

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

JEFFREY T. GREEN
JACQUELINE GERSON COOPER
ALEXANDRA R. GELBER
ERIC A. SHUMSKY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

WILLIAM C. INGRAM
First Assistant Federal Public Defender
Counsel of Record
LOUIS C. ALLEN, III
Federal Public Defender
ELIZABETH A. FLAGG
Research & Writing Attorney
FEDERAL PUBLIC DEFENDER OFFICE
Suite 210
101 South Elm Street
Greensboro, North Carolina 27401
(336) 333-5455

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONER 1

I. RESPONDENT FAILS TO DISTINGUISH *JONES*..... 1

II. THE LEGISLATIVE HISTORY OF § 924(c) DOES NOT SUPPORT RESPONDENT'S ARGUMENTS..... 6

III. A STATUTE THAT INCREASES A MANDATORY MINIMUM IMPOSES A GREATER PUNISHMENT ON A DEFENDANT..... 8

IV. ALLOWING JUDGES TO MAKE FINDINGS THAT INCREASE A MANDATORY MINIMUM UNDERMINES THE RIGHT TO A JURY TRIAL 12

V. OVERRULING *McMILLAN* WOULD NOT HAVE DISRUPTIVE EFFECTS 14

VI. OVERRULING *McMILLAN* WOULD NOT INVALIDATE THE SENTENCING GUIDELINES 17

VII. TREATING BRANDISHING AS AN ELEMENT WILL NOT HAVE THE NEGATIVE PRACTICAL CONSEQUENCES CLAIMED BY RESPONDENT 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 16, 20

Apprendi v. New Jersey, 530 U.S. 466 (2000) 1, 16, 18

Bailey v. United States, 516 U.S. 137 (1995) 7, 8

Castillo v. United States, 530 U.S. 120 (2000) 2, 6, 7, 19, 20

Hicks v. Oklahoma, 447 U.S. 343 (1980) 11

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 6

Jones v. United States, 526 U.S. 227 (1999) ..... *passim*

Lindsey v. Washington, 301 U.S. 397 (1937) 9, 10, 11

Lynce v. Mathis, 519 U.S. 433 (1997) 10

McMillan v. Pennsylvania, 477 U.S. 79 (1986) ..... *passim*

Miller v. Florida, 482 U.S. 423 (1987) 9, 10, 11

Mullaney v. Wilbur, 421 U.S. 684 (1975) 5

United States v. Bailey, No. 1:00CR151-1 (M.D.N.C. Dec. 12, 2000) 19

United States v. Barker, 771 F.2d 1362 (9th Cir. 1985) 13

United States v. Bowser, 497 F.2d 1017 (4th Cir. 1974) 13

United States v. Brough, 243 F.3d 1078 (7th Cir.), *cert. denied*, 122 S. Ct. 203 (2001) 16

United States v. Daniels, 446 F.2d 967 (6th Cir. 1971) 13

United States v. Harris, 558 F.2d 366 (7th Cir. 1977) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Hartford, 489 F.2d 652 (5th Cir. 1974) 13

United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970) 13

United States v. Nance, 236 F.3d 820 (7th Cir. 2000), *cert. denied*, 122 S. Ct. 79 (2001) 16

United States v. Roper, 681 F.2d 1354 (11th Cir. 1982) 13

United States v. Schwarz, 500 F.2d 1350 (2d Cir. 1974) 13

United States v. Wardlaw, 576 F.2d 932 (1st Cir. 1978) 13

Weaver v. Graham, 450 U.S. 24 (1981) 2, 10, 11

Willeford v. Estelle, 637 F.2d 271 (5th Cir. Unit A Jan. 1981), *remanded from* 447 U.S. 931 (1980) 11

Williams v. Oklahoma, 358 U.S. 576 (1959) 13

Woosley v. United States, 478 F.2d 139 (8th Cir. 1973) 13

STATUTES

18 U.S.C. § 225(a) 15

18 U.S.C. § 924(c) ..... *passim*

18 U.S.C. § 924(c)(1)(A) ..... *passim*

18 U.S.C. § 924(c)(1)(B) 19

18 U.S.C. § 924(c)(4) 2, 5

18 U.S.C. § 1111 15

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 2119 3

18 U.S.C. § 2252A 16

18 U.S.C. § 3553 18

Ala. Code § 13A-5-6(a)(4), (5) 15

Minn. Stat. Ann. § 609.11(5) 15

LEGISLATIVE HISTORY

H.R. 125, 104th Cong. (1996) 7

H.R. 920, 104th Cong. (1995) 7

H.R. 3080, 104th Cong. (1996) 7

H.R. 3085, 104th Cong. (1996) 7

H.R. 3382, 104th Cong. (1996) 7

H.R. 3454, 104th Cong. (1996) 7

H.R. 3565, 104th Cong. (1996) 7

H.R. 3698, 104th Cong. (1996) 7

H.R. 3988, 104th Cong. (1996) 7

H.R. 4181, 104th Cong. (1996) 7

S. 3, 104th Cong. (1995) 7

S. 38, 104th Cong. (1995) 7

S. 1495, 104th Cong. (1995) 7

S. 1854, 104th Cong. (1996) 7

TABLE OF AUTHORITIES – Continued

Page

SCHOLARLY AUTHORITIES

Mark Kelman et al., *Context-Dependence in Legal Decision Making, in Behavioral Law and Economics* 61 (Cass R. Sunstein ed., 2000) 11

Barbara S. Vincent & Paul J. Hofer, Fed. Judicial Ctr., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* (1994) 17

OTHER AUTHORITIES

United States Sentencing Commission, *Guidelines Manual* (Nov. 2001) ..... *passim*

U.S. Sentencing Comm'n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) 17

REPLY BRIEF OF PETITIONER

Nothing in Respondent's brief undermines two fundamental propositions: (1) This case is squarely governed by *Jones v. United States*, 526 U.S. 227 (1999), which interpreted a structurally identical statute to set forth elements of the relevant criminal offense; and (2) this Court's recent Fifth and Sixth Amendment jurisprudence, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), have so undercut *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) that, as a constitutional matter, any fact that triggers a mandatory minimum sentence must be treated as an element of the underlying offense. Furthermore, Respondent's protestations to the contrary, overruling *McMillan* will have only limited effects. For each of these reasons, Petitioner must prevail.

I. RESPONDENT FAILS TO DISTINGUISH *JONES*.

As demonstrated in Petitioner's opening brief, this case is governed by *Jones*. The statute here is identical in structure to that in *Jones*; the statutes' subsections provide for steeply higher penalties; the facts in the subsections are as important as those in the principal paragraph; the definition of the crime is not complete without the conclusions offered in the subsections; the acts in the subsections have traditionally been treated as elements of the offense; and the legislative history expresses Congress's intent for the acts to be elements of the offense. Pet. Br. at 8-22. In short, Petitioner's argument remains unrefuted: Pursuant to this Court's opinion in *Jones*, § 924(c)(1)(A)(ii) and (iii) set forth elements of the offense and not sentencing factors.

Respondent attempts to distinguish the two statutes on the basis of their sentence ranges. First, Respondent argues that "the pivotal considerations in *Jones* are absent here," stating that "[u]nlike the carjacking statute, the sentencing provisions in Section 924(c)(1)(A) do not raise the maximum, but only increase the minimum." Resp. Br. at 6; *see also id.* at 9-10. This was not a "pivotal" consideration in *Jones*. Indeed, it was not a consideration at all. In interpreting the statute, the *Jones* Court noted only that the subsections provided for "steeper penalties," but did not concern itself with, nor even mention, the fact that they raised the statutory maximum sentence. This is unsurprising: Whether a particular provision increases the statutory maximum or minimum sentence is irrelevant to whether the statute creates a sentencing factor or an element of the offense.

Respondent next argues that "the findings under Section 924(c) do not result in 'steeply higher penalties,' " *id.* at 12, and that the Court should therefore infer that Congress did not intend the factors to be elements of the offense. However, the Court has held that a two year increase in punishment is sufficiently burdensome to implicate liberty interests. *See Weaver v. Graham*, 450 U.S. 24, 32 n.17, 33-36 (1981). Furthermore, the minimum penalty under § 924(c)(1)(A)(iii) for discharging a firearm is heightened from five years to ten. In *Castillo v. United States*, the Court noted the significance of exactly such a five year enhancement in the minimum sentence. 530 U.S. 120, 131 (2000).

Because "*all* violations of Section 924(c) are punishable by life in prison," Respondent next argues, the increase in the mandatory minimum sentence does not "affect the 'available penalty' at all." Resp. Br. at 12. This

argument ignores reality. It is true, of course, that some defendants could receive a seven or ten year sentence without a finding of brandishing or discharging. But this is not necessarily so, nor even likely.[1] As discussed in greater detail below, a defendant who would have received a five year sentence but instead receives the increased minimum of seven or ten years surely suffers a marked change in his "available penalty." *See infra* Part III.

Respondent goes on to offer the following syllogism: The subsections in both the statute in *Jones* and the statute here appear at first glance to set forth sentencing factors (even though the Court in *Jones* went on to reject this initial impression, 526 U.S. at 233); unlike § 2119, the maximum sentence for all violations of § 924(c)(1)(A) is life in prison; therefore, the "look" of § 924(c)(1)(A) should control because the subsections do not increase the maximum sentence, but rather limit the sentencing range. Resp. Br. at 11. Respondent again attempts to draw significance from the differing sentences described in the two statutes, but there is simply no logic to the argument. While it is true that the brandishing and discharging subsections do not raise the maximum sentence available under the statute, Respondent fails to explain why this would mean that § 924(c)(1)(A) was therefore intended to set forth sentencing factors.

---

[1] The Sentencing Guidelines recommend that a defendant receive the mandatory minimum for violations of this statute. United States Sentencing Commission, *Guidelines Manual*, § 2K2.4(a)(2) (Nov. 2001). Judges may only depart upward from this recommendation if they articulate a legally permissible justification, and there would rarely be enough aggravating factors to warrant a sentence of life in prison.

Drawing on the Court's observation in *Jones* that the facts in the subparagraph of § 2119 are at least as important as those in the principal paragraph, Respondent attempts to distinguish *Jones* on the basis that "[i]n section 924(c) . . . the basic evil is addressed in the principal paragraph," and that "the acts of 'brandishing' and 'discharging' do not pose qualitatively different dangers from the underlying prohibited conduct." *Id.* at 11-12. As an initial matter, Respondent offers no support for its conclusion; this is little more than *ipse dixit*. Moreover, this position defies common sense. Certainly the brandishing or discharging of a weapon radically changes the scenario for the victim, and poses dangers that are distinct and greater than simply possessing it. Obviously Congress agreed, for it determined that those acts were sufficiently more dangerous than the simple offense that they warranted separate mention and steeper penalties.

Respondent attempts to dismiss the 225 statutes cited by Petitioner to show that brandishing and discharging have traditionally been treated as offense elements by federal and state governments. Pet. Br. at 13-14. Focusing on the federal statutes, Respondent argues that "[t]hose provisions – which use traditional offense-defining language and do not separate 'discharge' from other elements by the word 'shall' or numbered subsections – demonstrate only that Congress knows how to make discharging an offense element when it wishes." Resp. Br. at 15. This argument does not refute the fact that Congress has chosen to make discharging an offense element in these statutes. Nor does Respondent point to any statutes that treat the discharge of a firearm as a sentencing factor. Furthermore, in *Jones* the Court looked at whether the acts were traditionally treated as offense elements,

not whether those acts were found in statutes identical in structure to the statute at issue. 526 U.S. at 235-36. The Court cited numerous statutes as evidence that serious bodily injury was traditionally treated as an element of the offense, *id.*, most of which varied in structure from § 2119.

As demonstrated by *Amicus* Cato Institute, the inclusion of a specific intent element in the definition of brandishing in § 924(c)(4) further supports the conclusion that brandishing is an element of the offense, because determinations of a defendant's intent traditionally fall within the province of the jury. Br. of Cato Institute at 13; *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975). Respondent answers that an identical definition of brandishing in the Sentencing Guidelines "makes clear that Congress's use of the phrase 'in order to intimidate' does not mean that brandishing is necessarily an offense element." Resp. Br. at 16 n.5. The Sentencing Commission's inclusion of intent language in the definition of brandishing in the Sentencing Guidelines does not alter the fact that intent is traditionally an element of the offense.

While Respondent argues that the hundreds of statutes cited by Petitioner are not persuasive, it offers scant evidence to support its own position that brandishing and discharging are traditional sentencing factors, relying only on a task force report and a handful of references to the Sentencing Guidelines. Resp. Br. at 13-14. The mere mention of an act in the Guidelines, however, does not mean that the act has traditionally been treated as a sentencing factor. Indeed, in *Jones*, the Court found that "serious bodily injury" was an element of the offense, despite the fact that serious bodily injury is mentioned

repeatedly in the Sentencing Guidelines. *See* USSG § 2A2.1(b)(1)(B); USSG § 2A2.2(b)(3)(B); USSG § 2A3.1(b)(4)(B).[2]

II. THE LEGISLATIVE HISTORY OF § 924(c) DOES NOT SUPPORT RESPONDENT'S ARGUMENTS.

A review of the legislative history reveals that Congress intended brandishing and discharging to be elements of § 924(c)(1)(A). Pet. Br. at 15-22. Respondent dismisses Petitioner's analysis, claiming that "Petitioner's citations to the legislative history refer primarily to the bill initially passed by the House, which differed in critical respects from the statute ultimately passed." Resp. Br. at 17 (citation omitted). That is simply incorrect. *See* Pet. Br. at 16-22. Petitioner cites to the legislative history from two Congresses and a number of different bills, which is appropriate here, as the process of amending the statute took place over two Congresses. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277-80 & n.19 (1981) (relying on a legislative record compiled over six years).

While accusing Petitioner of not drawing broadly enough from the legislative history, Respondent offers no evidence from the legislative history that brandishing and discharging were meant to be sentencing factors. Rather, Respondent selects one of over twenty-five bills that were introduced to amend § 924(c), then compares

---

[2] Respondent also relies on a comment in *Castillo* in which brandishing was used as an example of a manner in which a crime is carried out. Resp. Br. at 13. As already discussed, *Castillo*'s reference to brandishing was dicta. *See* Pet. Br. at 14 n.6.

the structure of that one bill to the statute that was ultimately enacted. Resp. Br. at 16-17.[3] Based on this comparison, Respondent concludes that differences in the structures of the statutes proposed in those two bills mean that Congress intended brandishing and discharging to be sentencing factors. But Respondent fails to identify a single statement by a member of Congress to support this theory. Respondent's conjecture about what Congress intended cannot counter actual statements in the legislative record.[4]

Respondent also rejects Petitioner's analysis of the evolution of § 924(c) after *Bailey v. United States*, 516 U.S. 137 (1995), contending that brandishing and discharging were not elements of the offense under the prior version of § 924(c), and therefore that the amendment to the statute did not constitute a significant departure from

---

[3] Although not an exhaustive list, in addition to the bills cited in Petitioner's opening brief, Pet. Br. at 17 n.8., the 104th Congress proposed amendments to § 924(c) in H.R. 125, H.R. 920, H.R. 3080, H.R. 3085, H.R. 3382, H.R. 3454, H.R. 3565, H.R. 3698, H.R. 3988, H.R. 4181, S. 3, S. 38, S. 1495, S. 1854.

[4] Relying on an opinion from the Fifth Circuit, Respondent asserts that "statements by members of Congress referring to 'mandatory minimum sentences' do not support petitioner's reading of Section 924(c) but instead 'indicate[ ] that Congress viewed the subsections as penalty enhancements.' " Resp. Br. at 17 (alteration in original) (citation omitted). Respondent incorrectly claims that "penalty enhancement" is necessarily synonymous with "sentencing factor." The Court has rejected such arguments before. *Jones*, 526 U.S. at 237-38 ("The Government points to several statements in the 1996 amendment's legislative history in which subsection (2) is described as providing a 'penalty enhancement'. . . . [We] find the quoted statements unimpressive.") (citation omitted); *Castillo v. United States*, 530 U.S. 120, 129-30 (2000).

past practice. Resp. Br. at 18. Although it is true that the prior version of the statute referred only to "use or carry," the specific types of use, such as brandishing or discharging, were proved to a jury beyond a reasonable doubt, not established before the sentencing judge by a preponderance of the evidence. *Bailey*, 516 U.S. at 139. In practice, then, brandishing and discharging were elements of the offense. Accordingly, under Respondent's interpretation of the statute, the post-*Bailey* amendment effected a fundamental change. However, such a fundamental change should not be presumed absent an explicit expression by Congress of its intent to do so. *See Jones*, 526 U.S. at 234 ("[it is a] fair assumption that Congress is unlikely to intend any radical departure from past practice without making a point of saying so"); Pet. Br. at 15-16.

III. A STATUTE THAT INCREASES A MANDATORY MINIMUM IMPOSES A GREATER PUNISHMENT ON A DEFENDANT.

In his opening brief, Petitioner explained that increases in a mandatory minimum sentence implicate the underlying concerns of the reasonable doubt requirement because they heighten the deprivation of liberty and stigma attached to a crime. Pet. Br. at 30-34. Respondent counters that an increase in a mandatory minimum sentence does not expose a defendant to any punishment to which he was not already exposed by the jury's verdict. *See* Resp. Br. at 12, 30-31. However, the Court has recognized in the Ex Post Facto context that a statute that increases a minimum sentence imposes a greater punishment on a defendant even if it does not increase the statutory maximum to which the defendant is exposed.

In *Lindsey v. Washington*, 301 U.S. 397 (1937), the defendant was convicted of a crime that at the time of his offense carried a sentence of six months to fifteen years in prison, but that at the time of his conviction carried a mandatory sentence of fifteen years. The State argued that applying the new sentence to the defendant did not violate the Ex Post Facto Clause because he could have received fifteen years even under the old law. *See id.* at 400-01. The Court disagreed. It held that "the standard of punishment adopted by the new statute is more onerous than that of the old" and that "it is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence" less than fifteen years. *See id.* at 401-02.

The Court embraced this same logic in *Miller v. Florida*, 482 U.S. 423 (1987). There, the defendant was convicted of crimes that carried a maximum sentence of life in prison. *See id.* at 427. At the time the defendant committed the crimes, his sentencing range under the State's sentencing guidelines was three-and-one-half to four-and-one-half years in prison. Prior to his conviction, however, the guidelines were revised such that the presumptive sentencing range increased to five-and-one-half to seven years in prison. *See id.* at 424. The Court held that applying the new range to the defendant and sentencing him to seven years violated the Ex Post Facto Clause even though he could have received a higher sentence even under the old guidelines. *See id.* at 431-33. The Court explained that the Ex Post Facto Clause prohibits the government from " 'inflict[ing] a greater punishment' " on a defendant " 'than the law annexed to the crime, when committed.' " *See id.* at 429 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). Although the defendant

could have received the higher sentence even under the old range, the Court held that he was " 'substantially disadvantaged' " by the retrospective application of the new guidelines and that the punishment for his crime was made " 'more onerous' " by subjecting him to a range with a higher minimum. *See id.* at 433, 435.[5]

This case is nearly identical to *Lindsey* and *Miller*. Petitioner was convicted of a crime that carries a sentencing range of five years to life in prison, but the judge increased that range to seven years to life based on a finding that Petitioner brandished a weapon. The judge's finding did not expose Petitioner to a sentence above the statutory maximum, but his loss of liberty was nonetheless heightened. As in *Lindsey* and *Miller*, Petitioner's punishment was made "more onerous," and he was "substantial[ly] disadvantage[d]" by the judge's finding because he was "deprived of all opportunity to receive a sentence" less than seven years. *See Lindsey*, 301 U.S. at 401-02.

Although this case involves the Due Process Clause, not the Ex Post Facto Clause, the reasoning of *Lindsey* and *Miller* still applies. The question in those cases was

---

[5] *See also Lynce v. Mathis*, 519 U.S. 433, 447 (1997) (cancellation of prisoner's early release credits violated Ex Post Facto Clause because it "prolonged his imprisonment" six years, even though sentence was still within statutory range); *Weaver v. Graham*, 450 U.S. 24, 32 n.17, 33-36 (1981) (retrospective application of new formula for gain-time credits violated Ex Post Facto clause because it increased defendant's prison stay by two years, even though he was still within statutory range; "critical question . . . is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence").

whether an increase in the bottom end of a statutory range exposed a defendant to greater punishment even though the statutory maximum remained unchanged. By ruling in the affirmative, the Court recognized that a defendant faces a greater loss of liberty when the bottom end of a sentencing range is raised. Indeed, the Court in *Miller* rejected the state's claim that application of the revised guidelines did not "alter 'substantial personal rights.' " *Miller*, 482 U.S. at 430. "[T]he revised guidelines," the Court stated, "directly and adversely affect the sentence petitioner receives." *Id.* at 435; *see also Weaver*, 450 U.S. at 33 (stating that revision in formula for gain-time credits "alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment' "). Moreover, the Court has applied the same principle in due process cases. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980) (defendant was denied due process where jury was erroneously instructed that it must give forty year sentence even though jury could have given same sentence under correct instructions); *see also Willeford v. Estelle*, 637 F.2d 271, 272 (5th Cir. Unit A Jan. 1981), *remanded from* 447 U.S. 931 (1980).[6]

---

[6] *Lindsey*, *Miller*, and *Hicks* also recognize that changes in the sentencing range may affect the sentence that judges and juries choose within that range. *See also* Mark Kelman et al., *Context-Dependence in Legal Decision Making, in Behavioral Law and Economics* 61 (Cass R. Sunstein ed., 2000) (demonstrating the way in which the framing of choices influences the decisions people make).

IV. ALLOWING JUDGES TO MAKE FINDINGS THAT INCREASE A MANDATORY MINIMUM UNDERMINES THE RIGHT TO A JURY TRIAL.

Respondent next argues that allowing a judge to make findings that increase a mandatory minimum does not undermine the protections of the Sixth Amendment right to a jury trial. *See* Resp. Br. at 28-29. That right, Respondent claims, is designed to guard against over-zealous prosecutors and compliant or biased judges. But because prosecutors can demand, and judges can impose, higher sentences even without such a finding, Respondent argues that "[p]rohibiting a judge from determining a mandatory minimum sentencing factor would not" further the values protected by the Sixth Amendment. *See* Resp. Br. at 28.

This argument fails for two reasons. First, although prosecutors can request a sentence above five years for any conviction under § 924(c)(1)(A), they can only "demand" a higher sentence if they prove that the defendant brandished a weapon under subsection (ii). Prosecutors face a higher standard in proving this fact to a jury than to a judge; therefore, they gain a significant advantage when the judge is allowed to make the critical finding. Second, because the Guideline for § 924(c)(1)(A) instructs judges to impose the minimum sentence available under the statute, a biased or compliant judge also benefits when allowed to make findings that increase the mandatory minimum. *See* USSG § 2K2.4(a)(2). Without this authority, a judge can only impose a sentence above five years if the jury finds that the defendant brandished a weapon or if the judge offers a sufficient reason for departing upward. With this authority, however, the

judge can impose seven years without the jury's finding and without departing upward from the Guideline.

Respondent also argues that because a single judge – or even a group of judges – could decide to impose a minimum sentence of seven years on all defendants who brandish a weapon, there is no reason a legislature cannot make that decision for them. Resp. Br. at 24-25. But it is not clear that judges could decide *ex ante* to impose seven year sentences on any defendant who brandished a firearm without also considering mitigating factors. In *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959), the Court stated that "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." In addition, nearly every circuit court of appeals has ruled that a judge *must* exercise judicial discretion by determining the appropriate sentence based on the individual offender and not a particular offense.[7]

Even if judges could make this decision *ex ante*, there is a difference between increasing a sentence based upon judicial discretion and increasing a sentence based upon an enactment of positive law. When a legislature determines that one aspect of a crime is so important that it

---

[7] *See United States v. Wardlaw*, 576 F.2d 932, 939 (1st Cir. 1978); *United States v. Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974) (per curium); *United States v. Bowser*, 497 F.2d 1017, 1019 (4th Cir. 1974); *United States v. Hartford*, 489 F.2d 652, 655 (5th Cir. 1974); *United States v. Daniels*, 446 F.2d 967, 971 (6th Cir. 1971); *United States v. Harris*, 558 F.2d 366, 372 (7th Cir. 1977); *Woosley v. United States*, 478 F.2d 139, 143 (8th Cir. 1973); *United States v. Barker*, 771 F.2d 1362, 1367 (9th Cir. 1985); *United States v. Roper*, 681 F.2d 1354, 1361 (11th Cir. 1982); *United States v. McCoy*, 429 F.2d 739, 743 (D.C. Cir. 1970).

warrants an increased mandatory minimum sentence in every case, the legislature has in effect created an aggravated offense. *See* Br. of Families Against Mandatory Minimums Foundation at 7-12. To then take what is an element of an aggravated offense and label it a mere "sentencing factor" undermines the defendant's right to a jury trial and due process.

V. OVERRULING *McMILLAN* WOULD NOT HAVE DISRUPTIVE EFFECTS.

Respondent argues that *stare decisis* precludes this Court from overruling *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), as such a decision would have "disruptive effects." Resp. Br. at 44. Respondent claims that overruling *McMillan* "would call into question thousands of sentences imposed under" numerous statutes that mandate minimum sentences, *id.*, violating the various legislatures' reliance interests, *id.* at 43. Likewise, *Amici Curiae* invoke a parade of horribles, arguing that numerous states have relied on *McMillan* in enacting thousands of statutes, and that such reliance argues in favor of applying *stare decisis*. Br. of Criminal Justice Legal Foundation ("CJLF") at 23 ("*Amicus* will not recount in detail the hundreds, if not thousands of mandatory minimum provisions threatened by overruling *McMillan*"); Br. of 25 States and Territories ("25 States") at 11-12 (suggesting that overruling *McMillan* will affect laws in all fifty states); *id.* at 13-15. This concern is illusory, and is unsupported by the evidence purportedly marshaled in its favor.

First, many of the statutes supposedly enacted in reliance on *McMillan* were in fact enacted *prior to McMillan*. In fact, this is so for *each* of the five state statutes identified as examples of mandatory minimums

that turn on judicially-determined gun factors. *See* Br. of 25 States at 13 (citing statutes). *See, e.g.*, Ala. Code § 13A-5-6(a)(4), (5) (enacted 1977; amended 1981); Minn. Stat. Ann. § 609.11(5) (enacted 1981). A statute passed prior to *McMillan* can hardly be said to have been enacted in reliance upon that decision.

Furthermore, although some small number of statutes would certainly be affected if *McMillan* were reversed, such a ruling would hardly have the monumental effect that Respondent and *Amici* contend. The reason is simple: Overruling *McMillan* would not affect all statutes that contain a mandatory minimum penalty. Such a ruling would not invalidate statutes that contain a traditional mandatory minimum sentence, in which Congress simply specified some minimum sentence to accompany a designated crime, *see, e.g.*, 18 U.S.C. § 1111 (mandating life imprisonment for first degree murder); 18 U.S.C. § 225(a) (mandating ten years to life imprisonment for a continuing financial crimes enterprise). Rather, such a decision would affect only those few statutes in which a judicially-determined fact triggers an increase in the mandatory minimum.

But even among the smaller category of statutes that contain such an increased mandatory minimum, few statutes would be affected. Overruling *McMillan* would not affect statutes in which the increased mandatory minimum is triggered by a fact that has been specifically designated as an offense element, or in which the triggering fact is one that has traditionally been treated as an offense element. *See, e.g., Jones*, 526 U.S. at 235-37 ("serious bodily injury" is traditionally treated as an offense element). Such statutes would pass constitutional muster precisely because the triggering fact is an element of the offense.

Furthermore, overruling *McMillan* would not render unconstitutional those statutes that do not specify whether the fact that triggers the increased mandatory minimum is an element or a sentencing factor. Most statutes fall into this category, as statutes that impose increased mandatory minimums upon the finding of an additional factor generally do not address the procedure for making that finding. *See, e.g., United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir.) ("If Congress had specified that only judges may make the findings required by § 841(b), or that these findings must be made by a preponderance of the evidence, then § 841 would create a constitutional problem. But . . . the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden."), *cert. denied*, 122 S. Ct. 203 (2001). In the face of such statutory ambiguity, and following a decision overruling *McMillan*, courts would simply apply the canon of constitutional avoidance, and interpret the triggering factor as an element. This is just what the courts have done since *Apprendi*, simply characterizing (or recharacterizing) triggering facts as elements of the underlying offense. *See, e.g., United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000) (overruling pre-*Apprendi* precedent that drug quantity is a sentencing factor under 21 U.S.C. § 841, and recharacterizing it as an element of the offense), *cert. denied*, 122 S. Ct. 79 (2001).

Finally, overruling *McMillan* would not affect the application of statutes – like 18 U.S.C. § 2252A, cited by Respondent for the contrary point, *see* Resp. Br. at 44 – in which the mandatory minimum is triggered by a provision that penalizes recidivism. *See Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998).

In short, overruling *McMillan* would affect only those few statutes in which (1) a judicially-determined fact (2) triggers an increase in the minimum sentence. Thus, although Petitioner's review of the United States Code has turned up approximately sixty federal statutes that mandate some minimum sentence – a figure in which *Amicus Curiae* CJLF concurs, *see* Br. of CJLF at 23 – the application of only a handful of those statutes would be affected by the ruling that Petitioner seeks.

VI. OVERRULING *McMILLAN* WOULD NOT INVALIDATE THE SENTENCING GUIDELINES.

Respondent argues that overturning *McMillan* would "call into question the Federal Sentencing Guidelines" because "[l]ike mandatory minimums, the Sentencing Guidelines constrain the discretion of sentencing courts in order to prevent the unfair disparities associated with indeterminate sentencing." Resp. Br. at 38. But the Sentencing Guidelines differ greatly from increased mandatory minimums, both in structure and in their operation: "[T]he guidelines take into account many more factors than do the mandatory minimums; they maintain 'sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.'" Barbara S. Vincent & Paul J. Hofer, Fed. Judicial Ctr., *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 2 (1994). The Guidelines consider the base offense level, specific offense characteristics, and "certain generic adjustments . . . to further individualize the sentence." U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 21 (Aug. 1991) (footnote omitted). By contrast, increased mandatory minimums

operate upon the finding of a single factor. Furthermore, they do not allow mitigating circumstances to offset the statutory trigger. Thus, unlike the Guidelines, increased mandatory minimums do not further the goal of individualized sentencing.

In addition, the Sentencing Guidelines leave judges with considerable freedom to depart from the recommended range, and judges depart downward in more than one-third of all cases. *See* Pet. Br. at 40 n.15. Respondent argues that judges can also depart downward from mandatory minimums under the "substantial assistance" provision of 18 U.S.C. § 3553(e) or the "safety valve" provision of 18 U.S.C. § 3553(f). *See* Resp. Br. at 41. But a judge has no discretion to depart downward for substantial assistance without a request from the prosecution, *see* 18 U.S.C. § 3553(e), and safety valve departures are allowed only in drug cases and only if the defendant meets a five-part test, *see* 18 U.S.C. § 3553(f). Thus, an increase in the mandatory minimum is far more detrimental to a defendant than application of the Sentencing Guidelines because it leaves judges with much less discretion to depart downward.

VII. TREATING BRANDISHING AS AN ELEMENT WILL NOT HAVE THE NEGATIVE PRACTICAL CONSEQUENCES CLAIMED BY RESPONDENT.

Respondent argues that "a rule that requires that all facts that increase the mandatory minimum punishment be treated as elements of the offense could render indictments unwieldy and could unnecessarily complicate trials." Resp. Br. at 26. That concern has no basis. Since *Apprendi*, for example, the United States Attorney in the Middle District of North Carolina has charged brandishing and discharging in indictments under § 924(c). *See*,

e.g., *United States v. Bailey*, No. 1:00CR151-1 (M.D.N.C. Dec. 12, 2000) (defendant in a case brought under 18 U.S.C. § 924(c)(1)(A) charged in indictment with discharging firearm). This practice has not rendered indictments "unwieldy."

Nor would trials be unnecessarily complicated. The Court addressed this issue in the analogous context of machinegun cases brought under § 924(c)(1)(B):

> [T]o ask a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness. As a practical matter, in determining whether a defendant used or carried a "firearm," the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used.

Castillo, 530 U.S. at 127-28 (citation omitted). Likewise, given that juries must determine whether a defendant used or carried a firearm – an inquiry that ordinarily involves consideration of the circumstances surrounding the alleged use or carrying – there is nothing particularly complicated about juries determining whether the defendant brandished or discharged the firearm.

Along similar lines, Respondent asserts that "requiring jury determinations of facts that bear only on the applicability of mandatory minimum punishment could unnecessarily prejudice defendants. 'A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved.' " Resp. Br. at 28-29. Respondent's concern for criminal defendants is misplaced. The manifest unfairness to defendants of having brandishing proven only by a preponderance of the evidence, rather

than beyond a reasonable doubt, is far greater than any unfairness caused by the hypothetical situation posed by Respondent. *See Almendarez-Torres*, 523 U.S. 267 (Scalia, J., dissenting). In any event, as this Court has previously explained, such prejudice to defendants is likely to be minimal. *See Castillo*, 530 U.S. at 127-28.

CONCLUSION

For the reasons stated in Petitioner's opening brief and above, Petitioner respectfully requests that the decision of the Fourth Circuit Court of Appeals be reversed, Petitioner's seven year term of imprisonment be overturned, and this case be remanded to the district court for resentencing.

Respectfully submitted,

JEFFREY T. GREEN
JACQUELINE GERSON COOPER
ALEXANDRA R. GELBER
ERIC A. SHUMSKY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

WILLIAM C. INGRAM
First Assistant Federal Public Defender
Counsel of Record
LOUIS C. ALLEN, III
Federal Public Defender
ELIZABETH A. FLAGG
Research & Writing Attorney
FEDERAL PUBLIC DEFENDER OFFICE
Suite 210
101 South Elm Street
Greensboro, North Carolina 27401
(336) 333-5455

Counsel for Petitioner

Supreme Court, U.S.
FILED
JAN 23 2002
CLERK

(9)

No. 00-10666

In the Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR AMICI CURIAE THE CATO INSTITUTE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

STEPHEN P. HALBROOK*
Suite 404
10560 Main Street
Fairfax, VA 22030
(703) 352-7276
Counsel for Amici Curiae

*Counsel of Record

39 pp

QUESTION PRESENTED

Given that a finding of "brandishing", as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
STATEMENT OF INTEREST OF AMICI CURIAE		1
SUMMARY OF ARGUMENT		2
ARGUMENT		5
I.	THE TEXT AND STRUCTURE OF § 924(c) ESTABLISH THAT BRANDISHING IS AN ELEMENT OF THE OFFENSE	5
II.	BRANDISHING IS A TRADITIONAL CRIME SUBJECT TO DETERMINATION BY JURIES	13
III.	THE RULES OF LENITY AND CONSTITUTIONAL DOUBT REQUIRE THAT BRANDISHING BE TREATED AS AN ELEMENT	18
CONCLUSION		29

TABLE OF AUTHORITIES

CASES **Page**

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 24

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000) 4, 5, 22, 25, 26

Bailey v. United States, 516 U.S. 137 (1995) 17

Brown v. State, 166 Ga. App. 765, 305 S.E.2d 386 (1983) 15

Bryan v. United States, 524 U.S. 184 (1998) 10

Busic v. United States, 446 U.S. 398 (1980) 18

Castillo v. United States, 530 U.S. 120 (2000) ..... *passim*

Deal v. United States, 508 U.S. 129 (1993) 10

Duncan v. Louisiana, 391 U.S. 145 (1968) 20

Garrett v. United States, 471 U.S. 773 (1985) 10

Hughey v. United States, 495 U.S. 411 (1990) 27

In re Winship, 397 U.S. 358 (1970) 22, 23

Jones v. United States, 526 U.S. 227 (1999) ..... *passim*

Kelsoe v. Commonwealth, 226 Va. 197, 308 S.E.2d 104 (1983) 16

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 4, 23, 27

Mullaney v. Wilbur, 421 U.S. 684 (1975) 13, 22, 23

Nantz v. State, 740 N.E.2d 1276 (Ind. App. 2001) 16

Old Chief v. United States, 519 U.S. 172 (1997) 8

Patterson v. New York, 432 U.S. 197 (1977) 22, 23

Ratzlaf v. United States, 510 U.S. 135 (1994) 28

Rex v. Knight, Comb. 38, 90 Eng. Rep. 330 (K. B. 1686) 14

Rex v. Meade, 29 Times Law Reports 540 (1903) 14

Simpson v. State, 13 Tenn. (5 Yerg.) 356 (1833) 14

Simpson v. United States, 435 U.S. 6 (1978) 18

Staples v. United States, 511 U.S. 600 (1994) 5, 18

State v. Huntley, 25 N.C. (3 Iredell) 284 (1843) 14

State v. Tate, 54 O.S.2d 444, 8 O.O.3d 441, 377 N.E.2d 778 (1978) 16

TVA v. Hill, 437 U.S. 153 (1978) 21

United States v. Bass, 404 U.S. 336 (1971) 4, 18, 19

United States v. Batchelder, 442 U.S. 114 (1979) 8

United States v. Gaudin, 515 U.S. 506 (1995) 20

United States v. Harris, 66 F. Supp. 2d 1017 (N.D. Iowa 1999) 11

United States v. Pearson, 203 F.3d 1243 (10th Cir. 2000) 11

United States v. R.L.C., 503 U.S. 291 (1992) 28

United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) 28

CONSTITUTION

U.S. Const., Art. I, § 8 16

U.S. Const., Art. III, § 2 ..... 4, 19, 25

U.S. Const., Amend. V 4, 20, 21, 25

U.S. Const., Amend. VI 4, 19, 21, 25

STATUTES

8 U.S.C. § 1326 24

18 U.S.C. § 922(g) 8

18 U.S.C. § 922(x) 10

18 U.S.C. § 924(a)(6)(B) 10

18 U.S.C. § 924(c) ..... *passim*

18 U.S.C. § 924(c)(1) 7, 8, 29

18 U.S.C. § 924(c)(1)(A) 2, 5, 12

18 U.S.C. § 924(c)(1)(D)(i) 2, 9

18 U.S.C. § 924(c)(4) 2, 6, 13, 26

18 U.S.C. § 924(j) 2, 11

18 U.S.C. § 924(o) 9

18 U.S.C. App. § 1202(a) 8

18 U.S.C. § 2119 12

21 U.S.C. § 848(a) 9

P.L. 105-386, 112 Stat. 3469 (1998) 5

Conn. Gen. Stat. § 53-206c(c) (2001) 15

Idaho Code § 18-3304 (2000) 15

Ind. Code Ann. § 35-47-4-3 (2001) 15

Iowa Code § 708.1 (2001) 15

Mich. CLS § 750.234e(1) (2001) 15

Minn. Stat. § 609.66 15

Minn. Stat. § 609.713 15

Mont. Code Anno., §45-5-213(1) (2001) 15

N.J. Stat. § 2C:12-1.b(4) (2001) 15

NY CLS Penal § 265.35.3 (2001) 15

Ohio RC Ann. § 2911.01 15

S.C. Code Ann. § 16-23-420(B) (2000) 15

Va. Code Ann. § 18.2-282.A (2001) 15

13 V.S.A. § 4011 (2001) 15

W. Va. Code §61-7-11 (2001) 15

Wis. Stat. §941.20(1) (2000) 15

Wyo. Stat. § 6-2-504(b) (2001) 15

LEGISLATIVE MATERIAL

Cong. Rec. 28

OTHER AUTHORITIES

Blackstone, *Commentaries* 19

E. Coke, *The Third Part of the Institutes of the Laws of England* (6th ed. 1680) 14

J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836) 20

S. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice* (New York: Clark Boardman Callaghan/West Group, 1995, supp. 2001) 14-15

W. Hawkins, *Pleas of the Crown*, I (8th ed., London 1824) 14

O. Holmes, *The Common Law* (1963) 25

J. Story, *A Familiar Exposition of the Constitution of the United States* (1840) 20

U.S. Sentencing Commission, Guidelines Manual 16

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amicus Curiae the Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited, constitutional government. The Cato Institute has a substantial interest in supporting the position of the petitioner in order to uphold the constitutional rights of a criminal defendant to be informed of charges in an indictment and to be tried by an impartial jury. The Cato Institute believes that redefining crimes as sentencing factors undermines the intended role of the jury as a bulwark of American liberty.

Amicus Curiae the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with more than 10,400 members nationwide--along with 80 state and local affiliates with 28,000 members--including private defense lawyers, public defenders and law professors. NACDL's mission is to promote the study of criminal law and practice; to encourage the integrity, independence and expertise of criminal defense lawyers; and to strengthen our adversary system of justice. Founded in 1958, NACDL has a long tradition of safeguarding the rights of persons involved in the criminal justice system, including the right to jury trial.

Amici Curiae submit this brief with the consent of the parties.

---

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amici Curiae* made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Section 924(c)(1)(A) of Title 18, U.S. Code, provides that any person who, during and in relation to the commission of certain predicate offenses, "uses or carries a firearm," shall be sentenced to not less than 5 years imprisonment; "if the firearm is brandished," the minimum is 7 years, and if discharged, the minimum is 10 years.

"Brandish" means to display "or otherwise make the presence of the firearm known to another person, in order to intimidate that person." § 924(c)(4). Such mens rea and acts are elements of a crime which typically are found by juries. Such specification is unnecessary for a judge considering particular facts at sentencing.

The text and structure of § 924(c)(1)(A) make clear that brandishing is an offense. As in *Castillo v. United States*, 530 U.S. 120, 124 (2000), brandishing is in the same sentence as the "uses" offense. The offenses are in subparagraphs, but the carjacking offenses in *Jones v. United States*, 526 U.S. 227, 232-33 (1999), are similarly structured. Such concise draftsmanship makes it unnecessary to repeat all of the basic elements for each aggravated offense.

As in prior § 924(c)(1), the first part states offenses and the latter concerns sentencing matters. Subpart (A) does not refer to a "conviction," unlike the following subparts. Section 924(c)(1)(D)(i) prohibits probation for "any person *convicted* of a violation of this subsection," obviously referring in part to (A).

Also identically structured is § 924(j), which provides that causing death in a subsection (c) violation, "if the killing is a murder," may be punished by death, and otherwise "if the killing is manslaughter." Yet finding murder is obviously not a

mere sentencing function.

Identically-structured provisions must be interpreted consistently as a matter of due process. The right to notice precludes the linguistic anarchy inherent in construing statutes with identical structures to mean one thing here and the opposite elsewhere, based on factors not seen on the face of the statute.

Brandishing is as typical a crime in Anglo-American history as one could imagine. It requires a finding of the specific intent to make a firearm known to another to intimidate, matters that a jury would ordinarily find. Brandishing is punishable either as a named crime or an aggravated assault under the laws of every State.

That this may be the first federal statute to criminalize brandishing does not make it a sentencing factor. That argument could be made about every new federal crime when first enacted since the beginning of the federal criminal code. Parallel with brandishing, § 924(c) criminalizes a firearm's discharge, which is an element of numerous federal crimes.

As in *Castillo*, "to ask a jury, rather than a judge, to decide whether a defendant [brandished a firearm] would rarely complicate a trial or risk unfairness." 530 U.S. at 127. The jury would determine whether a firearm was brandished in the course of deciding if it was "used." Whether the firearm was brandished may also bear on the jury's determination of whether it was used "during and in relation to" a predicate offense.

To the extent any uncertainty remains, § 924(c) must be interpreted according to the rules of lenity and of constitutional doubt. Both require that brandishing be treated as a element to be found by the jury.

If uncertainty exists, "we would assume a preference for traditional jury determination of so important a factual matter."

Castillo, 530 U.S. at 131. The rule of lenity requires that ambiguous criminal statutes be construed in favor of the accused. The test is whether Congress has "plainly and unmistakably" enacted the harsher alternative, *United States v. Bass*, 404 U.S. 336, 348-49 (1971), which it did not do here.

The rule of constitutional doubt requires that brandishing and discharge be considered as elements of the offense. A "crime" cannot be construed as a "sentencing factor" so as to undercut the jury functions guaranteed in U.S. Const., Art. III, § 2, ¶ 3, and amendts. V & VI. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones*, 526 U.S. at 239.

Constitutional doubt exists here as to whether facts requiring an increased mandatory minimum sentence must be found by the jury, while in *Jones* doubt existed as to whether facts requiring an increased maximum sentence must be found by the jury. The latter issue was resolved in favor of the jury in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).

McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986), upheld a State sentencing factor requiring a minimum 5-year sentence, which was lower than the 10 and 20 year maximums for the actual offense. Since amended § 924(c) imposes only minimums and authorizes life imprisonment for every offense, it breaks out of the *McMillan* paradigm. But this Court need not consider whether *McMillan* no longer preserves the basic constitutional values at stake, for brandishing is easily construed as an element.

"It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."

Apprendi, 120 S. Ct. at 2363. The underlying premises would also apply to facts which increase mandatory minimum penalties. The essence of a crime is that "the law threatens certain pains if you do certain things . . . ." *Id.* at 2356. That evokes the Constitution's indictment and jury requirements. This is particularly true of specific intent crimes like brandishing: "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" *Id.* at 2364. The legislature cannot define and punish a crime, but remove it from the jury's purview by referring to it as a sentencing factor. But these constitutional doubts need not be resolved here, since brandishing is so easily construed as a element of the offense.

None of the above is changed by arguments about legislative history, which can never override the rules of lenity and of constitutional doubt. Further, the legislative history makes clear that brandishing was considered to be a crime.

ARGUMENT

I. THE TEXT AND STRUCTURE OF § 924(c) ESTABLISH THAT BRANDISHING IS AN ELEMENT OF THE OFFENSE

"The language of the statute [is] the starting place in our inquiry . . . ." *Staples v. United States*, 511 U.S. 600, 605 (1994). Section 924(c)(1)(A) of Title 18, U.S. Code, as amended by P.L. 105-386, 112 Stat. 3469 (1998), provides in pertinent part:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a

court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Subpart (B) provides for 10 and 30 year minimum sentences if the firearms are of certain specified types. For a subsequent conviction, subpart (C) requires a 25 year minimum sentence, and life imprisonment if the firearm is of certain types. Subpart (D) prohibits probation for a person so convicted.

Section 924(c)(4) provides:

> For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

The fact that Congress defined brandishing, carefully wording both the mens rea and acts required, demonstrates that brandishing is an aggravated crime. This is the type of definition typically given as a jury instruction, along with the admonition that each and every element must be proven beyond a reasonable doubt. A definition is unnecessary if brandishing

is a mere sentencing factor – the judge simply considers the particular facts without being bound by whether each and every one of the above elements are present.

The text and structure of § 924(c)(1) make clear that brandishing is an offense. As in *Castillo v. United States*, 530 U.S. 120, 124 (2000), "the first part of the opening sentence clearly and indisputably establishes the elements of the basic federal offense of using or carrying a gun during and in relation to a crime of violence." Further, "Congress placed the element 'uses or carries a firearm' and the word 'machinegun' in a single sentence," *id.* at 124-25, just has here terms such as "use" and "brandish" are in the same sentence and are separated by mere semicolons. Although former § 924(c)(1) was "not broken up with dashes or separated into subsections," *id.*, the amended version has one dash and three subparagraphs. The carjacking statute in *Jones* had numbered subsections making them "look" like sentencing factors, but that "look" was superficial. *Id.*, quoting *Jones v. United States*, 526 U.S. 227, 232-33 (1999).

Defining the basic and aggravated crimes and stating the corresponding penalties is clear and concise draftsmanship. First the basic offense is defined and penalized (totaling 125 words). The two "if" clauses introducing the brandishing and discharge offenses define aggravated crimes and punish them (totaling 19 and 18 words respectively). By using "if" instead of repeating all of the elements of the basic offense, economy of words is achieved over tedious repetition. Similarly, the term "if" is used to introduce subpart (B), which defines aggravated offenses involving specified firearm types, once again being concise rather than repeating all of the basic offense elements. No rule of statutory drafting requires senseless reiteration of the same elements over and over.

Both the basic and the aggravated offenses alike are in

the present tense: "uses or carries," "possesses," "if the firearm is brandished," "if the firearm is discharged," "if the firearm . . . is a short-barreled rifle" or other specified type. The present tense ties together each element in a moment in time to complete the offense. A sentencing factor may more likely be in the past tense, since the judge is looking at a past event.

The following aspects of prior § 924(c) continue to apply here:

> The next three sentences of § 924(c)(1) . . . refer directly to sentencing: the first to recidivism, the second to concurrent sentences, the third to parole. These structural features strongly suggest that the basic job of the entire first sentence is the definition of crimes and the role of the remaining three is the description of factors (such as recidivism) that ordinarily pertain only to sentencing.

Castillo, 530 U.S. at 125. Similarly, with amended § 924(c)(1), subpart (C) concerns recidivism[2] and subpart (D) concerns the same probation and concurrent-sentence prohibitions as before.

Amended § 924(c)(1) has further language not found in the prior version. While subpart (A) proscribes acts such as "using" and "brandishing," it does not refer to a "conviction." By contrast, subpart (B) begins, "If the firearm possessed by a

[2] This case does not concern whether subpart (C)'s reference to "a second or subsequent conviction" is an element or a sentencing factor. Elsewhere, the Gun Control Act treats a prior felony conviction as a element. 18 U.S.C. § 922(g) (felon in possession of firearm); *see Old Chief v. United States*, 519 U.S. 172, 174 (1997). One or more prior convictions were also elements in 18 U.S.C. App. § 1202(a) (repealed 1986). *See United States v. Batchelder*, 442 U.S. 114, 119 (1979).

person *convicted of a violation of this subsection*" is of specified types, and proceeds to impose 10 or 30 year minimums depending on firearm type. Subpart (C) begins, "In the case of a second or subsequent *conviction under this subsection*," and proceeds to impose sentences of 25 years or life. Subpart (A) does *not* begin, "If the firearm possessed by a person convicted of a violation of this subsection was brandished or discharged."[3]

Section 924(c)(1)(D)(i) provides that "a court shall not place on probation any person *convicted* of a violation of this subsection . . . ." (Emphasis added.) Thus, one must be "convicted" of (not just sentenced for) the acts described in "this subsection." "In the context of § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final

[3] Again, use of this language in (B) and (C) does not resolve whether the subjects thereof are elements or sentencing factors. As *Castillo* held, construing firearm types as sentencing factors would raise troublesome issues over what is traditionally a jury function. Moreover, subpart (B) must be read consistently with § 924(o), which unambiguously makes firearm type an element:

> A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

Congress obviously did not entrust the sentencing judge to find facts about firearm types authorizing life in prison.

judgment of conviction." *Deal v. United States*, 508 U.S. 129, 132 (1993).[4]

The fact that § 924 is entitled "Penalties" provides no guidance, for "at least some portion of § 924, including § 924(c) itself, creates, not penalty enhancements, but entirely new crimes." *Castillo*, 530 U.S. at 125. Complete offenses abound throughout § 924, some with structures identical to § 924(c).[5]

---

[4] Similarly, *Garrett v. United States*, 471 U.S. 773 (1985), construed 21 U.S.C. § 848(a), which provides enhanced penalties for recidivists engaged in a continuing criminal enterprise. This Court held:

> At this point there is no reference to other statutory offenses, and a separate penalty is set out, rather than a multiplier of the penalty established for some other offense. This same paragraph then incorporates its own recidivist provision, providing for twice the penalty for repeat violators of this section. Significantly the language expressly refers to "one or more prior convictions . . . under this section." Next, subparagraph (2) . . . also refers to any person "who is convicted under paragraph (1) of engaging in a continuing criminal enterprise," again suggesting that § 848 is a distinct offense for which one is separately convicted.

Garrett, 471 U.S. at 780.

§ 849 (now repealed) has "starkly contrasting language which plainly is not intended to create a separate offense": the court sits without a jury to consider prior offenses and determines status as a dangerous special drug offender by a preponderance of evidence. *Id.* at 782.

[5] *E.g.*, § 924(a)(6)(B) (a non-juvenile "who knowingly violates section 922(x)," which prohibits transfer of a handgun to a juvenile, "(i) shall be . . . imprisoned not more than 1 year," "and (ii) if the person sold" the handgun "knowing . . . that the juvenile intended to" use the handgun to commit a violent crime, "shall be . . . imprisoned not more than 10 years . . . ." *See Bryan v. United States*, 524 U.S. 184, 188 (1998) (construing

§ 924(j) is the most dramatic example of Congress' practice of setting forth offense elements in § 924 with a structure identical to that of § 924(c):

> A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall–
>
> (1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
>
> (2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

To construe murder and manslaughter as mere sentencing factors would be a radical departure from due process and the right to jury trial. The courts have held that the reference to murder in § 924(j) is an offense element.[6] Yet under respondent's interpretation of § 924(c), which has the same structure as § 924(j), the jury need only convict a defendant of causing a death through the use of a firearm in the course of a § 924(c) violation, and the court may find at sentencing that the death was murder and impose the death penalty.

Amended § 924(c) is structurally identical both to the prior version construed in *Castillo* and to the federal carjacking

---

elements of "willfully" and "knowingly" in § 924(a)).

[6] *United States v. Pearson*, 203 F.3d 1243, 1269-70 (10th Cir. 2000) (jury must find murder in course of § 924(c) violation); *United States v. Harris*, 66 F. Supp. 2d 1017, 1033 (N.D. Iowa 1999) (distinguishing *Jones*, 526 U.S. 227, in that indictment "specifically alleges murder").

statute, 18 U.S.C. § 2119, construed in *Jones*. The following compares the texts of §§ 2119 and 924(c)(1)(A):

18 U.S.C. § 2119	18 U.S.C. § 924(c)(1)(A)
Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, *shall* (1) be fined under this title or imprisoned not more than 15 years, or both, (2) *if* serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and (3) *if* death results, be fined under this title or imprisoned for any number of years up to life, or both.	. . . any person who, during and in relation to any crime of violence or drug trafficking crime . . ., uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, *shall* . . .– (i) be sentenced to a term of imprisonment of not less than 5 years; (ii) *if* the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and (iii) *if* the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years. (Italics added.)

In short, whoever commits act A "shall" be sentenced to X, and "if" he commits aggravating act B, "shall" be sentenced to Y. Both *Jones* and *Castillo* held that act B in statutes with this structure is an element of the offense. Other statutes with the same structure must be interpreted the same as a matter of consistent construction and due process. The result cannot vary

depending on, say, how many other statutes make the act a crime or what some member of Congress said on the floor. The criminal law would be a cruel joke if statutes with identical structures may or may not create offense elements depending on obscure circumstances not contained on the face of the statutes. The fundamental rights to notice and due process preclude the linguistic anarchy inherent in construing statutes with identical structures to mean one thing here and the opposite elsewhere.

In sum, the text and structure of § 924(c) makes clear that brandishing is an offense element.

II. BRANDISHING IS A TRADITIONAL CRIME SUBJECT TO DETERMINATION BY JURIES

Brandishing is as typical a crime in Anglo-American history as one could imagine. All of the reasons underlying the right to jury trial support treatment of brandishing as an element of the offense and not as a sentencing factor.

Section 924(c)(4) defines brandishing as a specific intent crime, requiring that a person display or make a firearm known to another "in order to intimidate that person." Statutes ordinarily entrust the determination of a defendant's intent to the jury. *See Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) ("although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not . . . justify shifting the burden to him").

Courts have not "typically or traditionally used firearm types (such as 'shotgun' or 'machinegun') as sentencing factors, at least not in respect to an underlying 'use or carry' crime." *Castillo*, 530 U.S. at 126. "Statutory drafting occurs against a backdrop . . . of traditional treatment of certain categories of important facts." *Id.*, quoting *Jones*, 526 U.S. at 234.

"Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones*, *id.* at 234.

It was an indictable offense at common law to go armed with the intent of committing crimes of violence.[7] Brandishing and discharge of firearms were included within this offense.[8] Such common-law offenses were recognized in the early Republic.[9]

Brandishing and inappropriate discharge of firearms, while labeled differently, are crimes in the laws of every State.[10]

---

[7] If any man "Ride[s] Armed covertly or secret with Men of Arms against any other to Slay him, or Rob him, or Take him, or Retain him till he hath made Fine and Ransom . . ., it . . . shall be judged Felony or trespass, according to the Laws of the Land of old time used . . . ." Edward Coke, *The Third Part of the Institutes of the Laws of England* 160 (6th ed. 1680). Carrying arms "malo animo" (with an evil mind) was a crime. *Rex v. Knight*, Comb. 38, 90 Eng. Rep. 330 (K. B. 1686).

[8] An affray was committed "where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law . . . ." William Hawkins, *Pleas of the Crown*, I, 488 (8th ed., London 1824). *See Rex v. Meade*, 29 Times Law Reports 540, 541 (1903) (offense charged was "under the common law," if the defendant was "firing a revolver in a public place, with the result that the public were frightened or terrorized").

[9] *State v. Huntley*, 25 N.C. (3 Iredell) 284 (1843) (defendant exhibited "dangerous and unusual weapons" and declared intent to kill). *Cf. Simpson v. State*, 13 Tenn. (5 Yerg.) 356, 358-60 (1833) (indictment for affray insufficient unless it alleges fighting in a public place).

[10] *See* "State Firearms Laws," App. A (heading "Miscellaneous" for each State), in Stephen P. Halbrook, *Firearms Law Deskbook: Federal and State Criminal Practice* (New York: Clark Boardman Callaghan/West Group, 1995, supp. 2001).

Many State statutes prohibit brandishing or pointing *per se*,[11] some define assault-type offenses to encompass those terms,[12] and others simply punish acts of brandishing under general assault statutes.[13] Brandishing may be an aggravation of another violent crime.[14] Brandishing is an element to be found

---

[11] *E.g.*, Va. Code Ann. § 18.2-282.A (2001) ("It shall be unlawful for any person to point, hold or brandish any firearm . . . in such manner as to reasonably induce fear in the mind of another"). *See also* Conn. Gen. Stat. § 53-206c(c) (2001); Idaho Code § 18-3304 (2000); Burns Ind. Code Ann. § 35-47-4-3 (2001); Mich. CLS § 750.234e(1) (2001); Minn. Stat. § 609.66 Subd. 1(a) (2000); NY CLS Penal § 265.35.3 (2001); S.C. Code Ann. § 16-23-420(B) (2000); 13 V.S.A. § 4011 (2001); Wis. Stat. § 941.20(1) (2000).

[12] *E.g.*, Iowa Code § 708.1 (2001) ("A person commits an assault when, without justification, the person does any of the following: . . . 3. Intentionally points any firearm toward another"). *See* MCLS § 750.329 (2001); Minn. Stat. § 609.713 Subd. 3(a) (2000); Mont. Code Anno., § 45-5-213(1) (2001); N.J. Stat. § 2C:12-1.b(4) (2001); W. Va. Code § 61-7-11 (2001); Wyo. Stat. § 6-2-504(b) (2001).

[13] *E.g.*, *Brown v. State*, 166 Ga. App. 765, 305 S.E.2d 386, 387 (1983) ("he deliberately got the gun and brandished it at his wife in order to scare her, thus committing an aggravated assault").

[14] *E.g.*, Ohio RC Ann. § 2911.01 (Anderson 2001) ("Aggravated robbery. (A) No person, in attempting or committing a theft offense, . . . shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it").

by the jury.[15]

Just as the use of a pistol and a machinegun "is great, both in degree and kind," and "numerous gun crimes make substantive distinctions between" such weapons, *Castillo*, 530 U.S. at 126-27, brandishing and discharge are aggravated crimes compared with less serious but unlawful use and carrying of firearms. The difference between these activities "is both substantive and substantial -- a conclusion that supports a 'separate crime' interpretation." *Id.* at 127.

While *Castillo* suggests in dictum that brandishing may also be a sentencing factor, *id.* at 126, so too is use of a firearm in a homicide. U.S. Sentencing Commission, Guidelines Manual § 2K2.1(c)(1)(B). But brandishing and murder remain statutory offenses.

The Fourth Circuit asserted that "Harris has cited no federal statute in which Congress has treated 'brandished' as a separate offense or element of an offense." 243 F.3d at 810. Yet this could be said about every new federal crime when first enacted in the Long March since 1789 of the creation of a federal criminal code.[16] This just happens to be the first time

---

[15] *E.g.*, *Kelsoe v. Commonwealth*, 226 Va. 197, 308 S.E.2d 104 (1983) ("There are two elements of the offense: (1) pointing or brandishing a firearm, and (2) doing so in such a manner as to reasonably induce fear in the mind of a victim."). *See Nantz v. State*, 740 N.E.2d 1276, 1283 (Ind. App. 2001); *State v. Tate*, 54 O.S.2d 444, 446, 8 O.O.3d 441, 377 N.E.2d 778 (1978).

[16] The only federal crimes explicitly authorized by the Constitution concern such matters as counterfeiting and piracy on the high seas. U.S. Const., Art. I, § 8. It would be a double stretching of the Constitution to argue that each new offense created by Congress to appear tough on what has long been a State crime is not triable by jury but is only a sentencing factor.

Congress made brandishing an element of a crime. Parallel with brandishing, § 924(c) also makes discharge a crime, and discharge may be found as an element of numerous federal crimes. *See* Brief for Petitioner.

In addition to traditional treatment as a crime, *Castillo* postulates the parallel traditional preference for fact finding by the jury. To paraphrase, "to ask a jury, rather than a judge, to decide whether a defendant [brandished a firearm] would rarely complicate a trial or risk unfairness." 530 U.S. at 127 . "As a practical matter, in determining whether a defendant used or carried a 'firearm,' the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used." *Id.* at 127-28. These circumstances include brandishing.

Inherent in the jury function of determining "uses or carries" is the finding of *how* a firearm was used. *See Bailey v. United States*, 516 U.S. 137, 148 (1995) (resolving "what evidence is required to permit a jury to find that a firearm had been used at all"). It would be illogical to conclude that Congress intended that the jury must determine whether a firearm was used, but not whether this use included brandishing or discharge.

Whether the firearm was brandished or discharged may also bear on the jury's determination of whether it was used or carried "during and in relation to" a predicate offense. Transforming brandishing or discharge into a sentencing factor "might unnecessarily produce a conflict between the judge and the jury," particularly when "the sentencing judge applies a lower standard of proof" and "additional years in prison are at stake." *Castillo*, 530 U.S. at 128.

In sum, brandishing is a traditional crime which is subject to determination by the jury, not the sentencing judge.

III. THE RULES OF LENITY AND CONSTITUTIONAL DOUBT REQUIRE THAT BRANDISHING BE TREATED AS AN ELEMENT

To the extent any uncertainty remains, § 924(c) must be interpreted according to the rules of lenity and of constitutional doubt. Both require that brandishing be treated as a element to be found by the jury.

To paraphrase *Castillo*, "the length and severity of an added mandatory sentence that turns on the presence or absence of [brandishing or discharge] weighs in favor of treating such offense-related words as referring to an element." 530 U.S. at 131. Here, the 5-year sentence increases to 7 years for brandishing and 10 years for discharge. If uncertainty exists, "we would assume a preference for traditional jury determination of so important a factual matter." *Id.* The "rule of lenity requires that 'ambiguous criminal statutes . . . be construed in favor of the accused.'" *Id.*, quoting *Staples*, 511 U.S. at 619 n.17. Like the more dangerous firearms in *Castillo*, brandishing "refer[s] to an element of a separate, aggravated crime." *Id.*

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson v. United States*, 435 U.S. 6, 15 (1978); *accord*, *Busic v. United States*, 446 U.S. 398, 405-06 (1980) (both construing § 924(c)). The test is whether Congress has "plainly and unmistakably" enacted the harsher alternative, *United States v. Bass*, 404 U.S. 336, 348-49 (1971), which it

obviously did not do here.[17]

Moreover, the rule of constitutional doubt requires that brandishing and discharge be considered as elements of the offense. A "crime" cannot be construed as a sentencing factor so as to undercut the requirements that "the trial of all crimes . . . shall be by jury," U.S. Const., Art. III, § 2, ¶ 3, or that "[i]n all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation." *Id.* Amend. VI. Blackstone, *Commentaries* *380, explained the policy behind the right to jury trial as follows:

> But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in . . . . This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice . . . .

Trial by jury is secure only "so long as this palladium remains sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations, which may sap and

---

[17] *Bass* explained why "doubts are resolved in favor of the defendant" as follows:

> First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.

Id. at 347-48 (citations and quotation marks omitted).

undermine it; by introducing new and arbitrary methods of trial . . . ." *Jones*, 526 U.S. at 246, quoting 4 Blackstone, *Commentaries* *342-344.[18]

Reflecting this tradition, John Marshall noted at the Virginia ratification convention in 1788:

> What is the object of a jury trial? To inform the court of the facts. . . . I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury.

III Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 557-58 (1836).

Also implicated is the requirement in U.S. Const. Amend. V that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . , nor be deprived of life, liberty or property, without due process of law . . . ." "The grand jury performs most important public functions; and, is a great security to the citizens against vindictive prosecutions . . . ." Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 390 (1840).

The term "crime," a fundamental concept in the Constitution's vocabulary, has an objective meaning and is assuredly not just anything the legislature or a court says it is

---

[18] "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The jury guarantee reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id. See United States v. Gaudin*, 515 U.S. 506, 510-11 (1995).

(or is not).[19] When what is really a "crime"is declared by the legislature or construed by the judiciary to be a sentencing factor, the power of the grand jury to accuse (or not accuse) a person of crime and of the petit jury to try the person is shifted to the judiciary. Yet the jury is just as much a constitutional decision maker as are the other branches of government, and its power cannot be usurped by word smithing.

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones*, 526 U.S. at 239 (citations omitted). Under this rule, brandishing and discharge must be interpreted as offense elements which must be charged in the indictment and proven to the jury beyond a reasonable doubt.

This case is in the same posture as was *Jones*, in that constitutional doubt exists here as to whether facts requiring an increased mandatory minimum sentence must be found by the jury, while in *Jones* doubt existed as to whether facts requiring an increased maximum sentence must be found by the jury.[20]

---

[19] Notes *TVA v. Hill*, 437 U.S. 153, 173 n.18 (1978):

> This recalls Lewis Carroll's classic advice on the construction of language: "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean–neither more nor less.'"

[20] *Jones*, 526 U.S. 243 n.6, explained the principle as follows:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our

The latter issue was resolved in favor of the jury in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

To begin with, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). This burden cannot be avoided by judicially redefining a crime as a sentencing factor.

Mullaney v. Wilbur, 421 U.S. 684, 686 & n.3 (1975), invalidated a murder statute providing that malice is presumed on proof of intent to kill resulting in death, except that the crime is manslaughter if defendant proves provocation in the heat of passion. The rebuttable presumption relieved the State of its due process burden to prove every element of the crime beyond a reasonable doubt. *Mullaney* stated:

> Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Id. at 697.

Patterson v. New York, 432 U.S. 197, 205-06 (1977), upheld a definition of murder as causing death with intent, subject to an affirmative defense of extreme emotional disturbance. There was no presumption of malice, and at

---

concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

common law the prosecution need not disprove beyond a reasonable doubt every fact constituting an affirmative defense. *Id.* at 202, 210-11. The Court noted:

> This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.

Id. at 210. This is open to the broad reading that "the State lacked the discretion to omit 'traditional' elements from the definition of crimes and instead to require the accused to disprove such elements." *Jones*, 526 U.S. at 241-42.

Underlying *Winship*, *Mullaney*, and *Patterson*, regardless of how each case resolved the burden shifting, is the premise that the jury determines all of the pertinent facts. By contrast, transforming an element into a sentencing factor completely removes the fact finding from the jury.

McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986), upheld a State statute imposing a minimum 5-year sentence where the court finds the fact of visible possession of a firearm at sentencing by a preponderance of evidence. The enhancement was lower than the 20- and 10-year maximum sentences authorized for the actual offenses, and thus "the statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. The claim that visible possession is really an offense element "would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment, . . . but it does not." *Id.*

Since amended § 924(c) imposes only minimums and authorizes life imprisonment for every offense, it breaks out of the *McMillan* paradigm altogether. *McMillan* was decided before the Brave New World in which all crimes of a class, from the lowest level to the most aggravated, have the same maximum of life imprisonment. Perhaps the time has come when this Court should consider whether the *McMillan* framework no longer protects the basic constitutional values at stake. But this Court need not do so in this case, for brandishing is easily construed as an element.

Almendarez-Torres v. United States, 523 U.S. 224, 230 (1998), held that recidivism, which is "as typical a sentencing factor as one might imagine," is not an element of the crime of unlawful reentry after deportation under 8 U.S.C. § 1326. By contrast, brandishing (by whatever name) and discharge are prosecuted as crimes in every State in the United States. Moreover, recidivism is rarely contested and may create unfair prejudice with the jury. *Id.* at 235. But in determining whether a firearm was "used," the jury will invariably determine if it was brandished or discharged, which is frequently contested. Finally, unlike other allegations, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 526 U.S. at 249.

Interpretation of aggravated crimes as sentencing factors reduces the jury function to "low-level gatekeeping," i.e., the jury's fact finding necessary for the basic offense with the lowest-level punishment opens the door to a judicial finding sufficient to impose far-higher sentences. *Jones*, 526 U.S. at 243-44. The jury's fact finding for a minimum 5-year sentence here would open the door to a judicial finding triggering minimum 7- and 10-year sentences respectively.

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), held that facts which result in an increase in the maximum punishment must be found by the jury. Its underlying premises would also apply tó facts which increase mandatory minimum penalties. With the exception of the fact of a prior conviction, *Apprendi* endorsed the following: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 120 S. Ct. at 2363, quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring). Justice Stevens added in that concurrence: "a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence . . . ." *Id.* at 253.

Apprendi found the essence of a "crime" to be as follows: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them." *Id.* at 2356, quoting O. Holmes, *The Common Law* 40 (1963).[21] "[T]he procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment." *Id.*

Where a "crime" is concerned, the Constitution repeatedly addresses the role of the grand jury and the petit jury. U.S. Const., Art. III, § 2; Amdts. 5 and 6. *Apprendi* relates about the original intent:

> Any possible distinction between an

---

[21] "This case turns on the seemingly simple question of what constitutes a 'crime.'" *Id.* at 2367-68 (Thomas, J., concurring) (quoting Fifth and Sixth Amendment guarantees). "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)." *Id.* at 2369.

> "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.

120 S. Ct. at 2356.

Brandishing includes the specific intent of making the presence of a firearm known to intimidate another, § 924(c)(4), and criminal intent has always been a jury matter. "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" 120 S. Ct. at 2364. The legislature cannot define and punish a crime, but remove it from the jury's purview by referring to it as a sentencing factor:

> [A] State cannot through mere characterization change the nature of the conduct actually targeted. It is as clear as day that this hate crime law defines a particular kind of prohibited intent, and a particular intent is more often than not the sine qua non of a violation of a criminal law.

Id. at 2364 n.18.

The harsher minimum imprisonment and additional blameworthiness also make clear that brandishing is a crime. *Apprendi* states: "Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance." *Id.* at 2365.

Thus, the principles set forth in *Apprendi* apply just as much to increases in mandatory minimum sentences as to increases in the maximum sentence. As Justice Thomas, joined by Justice Scalia, wrote in his concurrence:

> The mandatory minimum "entitles the government" . . . to more than it would otherwise be entitled . . . . Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.

Id. at 2379-80 (Thomas, J., concurring) (citation omitted).

But this case does not require this Court to decide whether *McMillan* has been outmoded by the legislative trick of making all offenses of a type potentially punishable by life imprisonment. "[T]he Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions." *Jones*, 526 U.S. at 251-52. Accordingly, brandishing must be construed as an element of an offense "which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict."[22] *Id.*

A final point is in order. According to the Fourth Circuit, the legislative history establishes that brandishing is a sentencing factor. *Harris*, 243 F.3d at 810-11. However, "principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of . . . legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990). Even where there are "contrary indications in the statute's legislative history," a court must "resolve any doubt in favor of the

---

[22] Should this Court reach that issue, *amici curiae* suggest that *McMillan* should be overruled for the reasons stated by petitioner and by *Amicus Curiae* Families Against Mandatory Minimums Foundation.

defendant."[23] *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Nor can legislative history override the doctrine of constitutional doubt.

Statutes with identical structures – the two versions of § 924(c) and the statute in *Jones* – cannot be construed differently regarding elements versus sentencing factors based on a court's rendition of legislative history.[24] Under this discordant linguistic methodology, citizens may not rely on uniformity in the language or structure of criminal laws, but are subject to prosecution based on a court's *post hoc* portrayal of "legislative history."

That said, factually the legislative history here makes clear that brandishing was considered to be a crime.[25] Not one

---

[23] *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992), (applying rule of lenity); *id.* at 521 (Scalia, J., concurring, joined by Thomas, J.) ("that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history" is "particularly inappropriate in determining the meaning of a statute with criminal application").

[24] *See United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.) (the fiction that one is presumed to know the criminal law "descends to needless farce when the public is charged even with knowledge of Committee Reports").

[25] *See* House Report 105-344, 105th Cong., 1st Sess., 12 (Oct. 24, 1997) ("To sustain a *conviction* for brandishing or discharging a firearm"); 144 Cong. Rec. H533 (Feb. 24, 1998) (remarks of Rep McCollum) (bill provides that "a crime be the possession or the brandishing or the discharging of the gun"); *id.* at H10329 (Oct. 9, 1998) (remarks of Rep McCollum) (House-Senate compromise bill "clarifies Congress' intent as to the type of criminal conduct which should trigger the statute's application," including "using a gun, possessing in the course of a crime a gun, or certainly brandishing or discharging that gun."); *id.* (remarks of Rep. Scott) (comparing brandishing and discharge penalties "to the penalties for *other crimes*").

proponent cited any need to transform the acts condemned in § 924(c) from elements of the offense to sentencing factors, and not one opponent criticized the bills for usurping the right to jury trial. *See Castillo*, 530 U.S. at 130 ("the 'mandatory sentencing' statements to which the Government points show only that Congress believed that the 'machinegun' and 'firearm' provisions would work similarly").

In sum, the decision below is inconsistent with this Court's teachings on the construction of criminal statutes. This Court has never suggested that legislative history overrides any consideration of the doctrine of constitutional doubt or the rule of lenity, both of which require that brandishing as prohibited in § 924(c) be construed as an offense element.

CONCLUSION

This Court should reverse the judgment of the court of appeals, vacate the petitioner's 7-year sentence, and remand the case for resentencing under 18 U.S.C. § 924(c)(1) to 5 years imprisonment.

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Counsel for Amici Curiae the Cato Institute and the National Association of Criminal Defense Lawyers

*Counsel of Record

(10)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 00-10666

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN SUPPORT OF PETITIONER

MARY PRICE
General Counsel
FAMM Fdtn., Suite 1400
1612 K Street, NW
Washington, DC 20006
(202) 822-6700

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorneys for Amicus Curiae

January 2002

36 pp

QUESTION PRESENTED AND ADDRESSED BY AMICUS FAMM FOUNDATION

Should this Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), be formally overruled, in light of *Apprendi v. United States*, 530 U.S. 466 (2000), because any fact which may result in the imposition of an otherwise-inapplicable mandatory minimum penalty defines a different crime or "offence" under the Constitution?

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim
Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936) 29
Bailey v. United States, 516 U.S. 137 (1995) 7
Castillo v. United States, 530 U.S. 120 (2000) 7
Dorszynski v. United States, 418 U.S. 424 (1974) 27
Egelhoff v. Montana, 518 U.S. 32 (1996) 16
Furman v. Georgia, 408 U.S. 238 (1972) 14, 22
Gregg v. Georgia, 428 U.S. 153 (1976) 22
Koon v. United States, 518 U.S. 81 (1996) 28
Lockett v. Ohio, 438 U.S. 586 (1977) 22
McMillan v. Pennsylvania, 477 U.S. 79 (1986) ..... passim
Mullaney v. Wilbur, 421 U.S. 684 (1975) 2, 3, 7-9, 12
Patterson v. New York, 432 U.S. 197 (1977) 2, 8, 9
Penry v. Lynaugh, 492 U.S. 302 (1989) 22
Specht v. Patterson, 386 U.S. 605 (1967) 2
Tison v. Arizona, 481 U.S. 137 (1987) 16
United States v. Cordoba-Hincapie,
825 F.Supp. 485 (E.D.N.Y. 1993) 16
United States v. Harris, 243 F.3d 806
(4th Cir. 2001) 6, 7, 24-25
United States v. Lopez, 514 U.S. 549 (1995) 29
Williams v. New York, 337 U.S. 241 (1949) ..... passim
In re Winship, 397 U.S. 358 (1970) 2, 3, 7, 9, 12

CONSTITUTION, STATUTES AND RULES

U.S. Const., amend. V
(Due Process, grand jury) 2, 9, 23, 24
U.S. Const., amend. VI (notice and jury trial) 2, 9, 23, 24
U.S. Const., amend. XIV (due process) 2, 19
18 U.S.C. § 924(c) ..... passim
18 U.S.C. § 3553(a) 22, 29
18 U.S.C. § 3553(b) 28
18 U.S.C. § 3661 26

TABLE OF CONTENTS

Question Presented i
Table of Authorities iv
Interest of Amicus Curiae 1
Summary of Argument 2
ARGUMENT:
***APPRENDI* REQUIRES THAT *McMILLAN* BE OVERRULED** 6
1. The Essential Principle Underlying *Apprendi* Cannot Be Reconciled With the Holding of *McMillan* 6
2. *Apprendi's* Terminology Should Be Clarified 12
3. *McMillan* Should Be Formally Overruled 17
4. The Mandatory Minimum Sentence Imposed in the Instant Case Should Be Reversed 24
5. Overruling *McMillan* Will Be Minimally Disruptive to Most Contemporary Guideline Sentencing Systems 26
Conclusion 29-30

21 U.S.C. § 841(b) 1
21 U.S.C. § 850 26
Cal. Penal Code § 190.3(h) 13
Colo. Rev. Stat. Ann. §§ 16-11-103(4) 13
N.C. Gen. Stat. § 15A-2000(f) 13
N.Y. Grim. Pro. Law §§ 400.27(9) 13
42 Pa.Cons.Stat. § 9712 (1982) 18
Rev. Code Wash. § 9.94A.150 (2001) 27
Rev. Code Wash. § 9.94A.210(1) 27
Rev. Code Wash. § 9.94A.210(2) (2001) 27
Rev. Code Wash. § 9.94A.310 (2001) 27
Rev. Code Wash. § 9.94A.390 (2001) 27
S.Ct. Rule 37.3(a) 1
S.Ct. Rule 37.6 1
USSG § 6A1.3 (p.s.) 24

MISCELLANEOUS

Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 N.D.L.Rev. 21 (2000) 29
Alan Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U.Pa.L.Rev 297 (1974) .. 11
FAMMgram, vol. 11, no. 3 (Fall 2001) 25
Marvin Frankel, Criminal Sentences (1974) 11
Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo.L.J. 387 (2002) 15, 16, 19
Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 Wm. & Mary L. Rev. 943 (2000) 15
Kyron Huigens, *Virtue and Inculpation*, 108 Harv.L.Rev. 1423 (1995) 15
http//www.famm.org 25
Dan M. Kahan, *Ignorance of Law Is an Excuse -- But Only for the Virtuous*, 96 Mich. L. Rev. 127 (1997) 15
Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269 (1996) 15

BEST AVAILABLE COPY

Mark Kelman, *Strict Liability: An Unorthodox View*, in Encyclopedia of Crime and Justice (1983) 16
Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 Hastings L.J. 829 (2000) 10
Wayne R. LaFave, Criminal Law (3d ed. 2000) 15
Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 U.S.C. L.Rev. 953 (1998) 15
Model Penal Code § 210.6 (ALI 1985) 14
1 Model Penal Code and Commentaries, pt. I, § 2.05, cmt. 1 (ALI 1985) 16
Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J.Crim.L. & Crimin. 1075 (1997) 16
Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463 (1992) 15

BRIEF OF AMICUS CURIAE FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION, IN SUPPORT OF PETITIONER

FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION files this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of petitioner William Harris. Both petitioner and respondent have granted consent to file this brief, and letters of consent have been filed with the Clerk of this Court.*

INTEREST OF AMICUS

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. Founded in 1991, FAMM has over 24,000 members in 35 Chapters nationwide. Most of our members are either serving mandatory minimum sentences or are family members of those prisoners. FAMM argues that mandatory minimum statutes, including 18 U.S.C. § 924(c) (as amended, 1988) as well as the commonly-prosecuted 21 U.S.C. § 841(b), are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function unwisely from the judiciary to the prosecution. To the extent that such statutes continue to exist, FAMM and its members have an urgent interest in seeing them applied only when the facts clearly warrant, including the right to grand jury indictment and jury verdict beyond a reasonable

* No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than FAMM and its membership, made any monetary contribution to its preparation or submission. See Rule 37.6.

doubt. FAMM does not contend that crime should go unpunished, but rather that the punishment should fit the crime.

SUMMARY OF ARGUMENT

The terms "crime," "offence" and "accusation," as employed in the Fifth and Sixth Amendments to the Constitution of the United States, must have some definite meaning if the rights associated with those constructs are not to be easily swept away by legislative evasion. Yet this Court has been caught in a dilemma for the past half century over the definition of these key constitutional terms. On one hand, the Court has held that the Constitution protects and preserves protections for criminal defendants, including proof beyond a reasonable doubt and trial by jury. See *Specht v. Patterson*, 386 U.S. 605 (1967); *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). On the other hand, the Court has held that the Constitution places few if any limits on the power of Congress and state legislatures to define criminal offenses, defenses, and sentences, including how those sentences are determined. See *Williams v. New York*, 337 U.S. 241 (1949); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). These two lines of authority serve core constitutional values, but each threatens to overwhelm the other. The *Winship-Mullaney* line challenges the constitutional values of federalism and legislative primacy. The *Williams-McMillan* line could reduce the Fifth and Fourteenth Amendment Due Process Clauses and the Sixth Amendment's notice and jury trial guarantees to dead letters. The latest case addressing this tension, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), sparked a dissent that characterized the opinion as based on a meaningless formalism and as a sharp departure from the Court's precedents. See *Apprendi*, 530 U.S. at 541

(O'Connor, J., dissenting). But the precedents that the dissenters invoked were marked by equally sharp and cogent dissents that later commanded a majority in *Apprendi*. See, *e.g.*, *McMillan*, 477 U.S. at 100-02 (Stevens, J., dissenting).

This brief explains why the core principle of *Apprendi* -- that facts which justify and authorize particular levels of punishment must be proved beyond a reasonable doubt to a jury -- applies not only where the legislature authorizes the sentencing court to exceed what would otherwise be the statutory maximum, but also where the court is prohibited from sentencing below a statutory minimum. Amicus FAMM accordingly urges this Court to reverse the judgment of the Fourth Circuit and remand this case for resentencing.

Despite the differences between the *Williams-McMillan* and the *Winship-Mullaney* lines of authority, they share a common approach to the constitutional definition of a criminal "offense." Sentencing, the province of judges, relies to some extent on predicate findings of guilt by the jury. The problem entails drawing the line between the functions of the jury and the functions of the judge. In its efforts to draw that line the Court has attempted to define the categories of facts for which the judge is responsible and those which a jury must find. Thus, in *McMillan* the Court held that a legislature could declare any fact a "sentencing factor" instead of an element, and assign it to the judge rather than the jury, provided only that the fact was not "a tail which wags the dog of the substantive offense." 477 U.S. at 88. In *Apprendi*, the Court struck down the New Jersey legislature's assignment to the judge, holding instead that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

This brief argues against these efforts to define categories of facts, and urges the Court to focus more directly on the constitutionally significant differences between the jury's function and that of the sentencing court. In any criminal case where trial by jury has not been waived, the jury determines wrongdoing and criminal fault, whereas the judge determines the applicable sentence.[1] In setting an appropriate sentence, the judge may also consider the offender's wrongdoing and fault, but does so for different purposes and subject to different legal and moral constraints. Once the two institutions' respective functions are carefully described with attention to these differences *McMillan* and its principal innovation -- the notion of a legislatively mandated "sentencing factor" -- are fatally undermined.

McMillan rests on an appealing but fallacious syllogism. The Court recognized in *Williams,* that a judge invested with sentencing discretion can base a sentence on any facts or none at all. 337 U.S. at 251-52. If a legislature designates discrete "sentencing factors" along with procedural requirements such as proof by a preponderance, then this might seem to be a gain for constitutional values, as compared with unfettered discretion. *McMillan* draws this conclusion, 477 U.S. at 91-92, but it does not follow. *McMillan* overlooks the significance of a legislature's enacting sentencing considerations into positive law. If some aspect of the offender's conduct is so salient to blameworthiness or fault that the legislature determines that it must result, if proven, in the imposition of a minimum sentence, then that fact ought to be litigated -- just as every other aspect of the wrongdoing is litigated -- before a jury, to a reasonable certainty.

[1] The *Apprendi* principle surely applies also to guilty pleas and bench trials, but exactly how it applies is not before the Court at this time.

The clarifications in terminology offered by this brief should help the Court to see the constitutional significance of a legislature's enacting sentencing considerations into positive law. *Mens rea*, for example, is one such salient aspect of the offender's wrongdoing. In *Apprendi*, all nine Members of this Court agreed, at least implicitly, that if racial animus were a *mens rea* instead of a motive, then that fact would have to be proved beyond a reasonable doubt to a jury. See *Apprendi*, 530 U.S. at 492 (opinion of the Court); accord, *id.* at 553 (O'Connor, J., dissenting).

The Constitution requires the conduct, circumstances, and results that comprise the offender's legislatively-defined wrongdoing to be proved to a jury beyond a reasonable doubt. The Constitution, as *Apprendi* teaches, also places *mens rea* in the jury's domain, because *mens rea* is indistinguishable from the rest of the wrongdoing. Indeed, *mens rea* is often what converts what might otherwise be merely undesirable behavior into criminal wrongdoing. The same points hold for fault considerations beyond *mens rea*. All the distinctive features of the offender's conduct that make it criminal and which, by statute, determine the severity of the wrongdoing, ought to be proved in the same manner and in the same proceeding as the rest of the offender's wrongdoing, without regard to the appellation "element" or "sentencing factor."

Finally, this brief will explain why these principles require the abolition of non-jury mandatory minimum sentencing as authorized by *McMillan* but do not require the abolition of determinate or guided-discretion sentencing generally.

ARGUMENT:
APPRENDI REQUIRES THAT *McMILLAN* BE OVERRULED.

1. The Essential Principle Underlying *Apprendi* Cannot Be Reconciled With the Holding of *McMillan*.

The decision of the Fourth Circuit below should be reversed. The holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was carefully stated to not prejudge the continuing viability of *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986). *McMillan*, however, cannot survive. A correct application of the principles which informed *Apprendi* shows that its holding, requiring jury decisionmaking beyond a reasonable doubt, cannot tenably be limited only to those facts which may lead to an increase in the statutory maximum penalty that would otherwise apply. The constitutionally essential character of facts in both cases is the same: the legislature has determined that a certain finding leads to a conclusion of wrongdoing that in turn leads to a sentence range prescribed by the legislature. *Apprendi's* essential holding must now be extended to encompass all those facts designated by legislatures as requiring punishment.

The statute under which petitioner Harris was convicted and sentenced provides for a sequence of minimum sentences that vary on the basis of facts about how a firearm was used during and in furtherance of a drug transaction or violent crime.[2] The district court found that

[2] If the offender merely possessed a weapon, the minimum sentence is 5 years. If the offender brandished a weapon, the minimum sentence is 7 years. If the weapon was discharged, the minimum sentence is 10 years. Petitioner and amicus NACDL argue that the statute, which is silent with respect to the question of whether the jury or sentencing judge is to make this critical finding, is properly construed to require that the fact be found by the jury, as an element of a set of greater-inclusive offenses. FAMM does not disagree. See

Harris had brandished his weapon and sentenced him to serve seven years' imprisonment -- the minimum term provided by 18 U.S.C. § 924(c)(1)(A)(ii) (Supp. IV 1998). See *United States v. Harris*, 243 F.3d 806, 807 (2001).

As the Fourth Circuit held, the precise holding in *Apprendi v. New Jersey* does not prohibit this result. *Apprendi* requires a jury to decide facts that increase punishment only if the facts may be used to increase the sentence beyond a statutory maximum. 530 U.S. at 490. Section 924(c), as amended after *Bailey v. United States*, 516 U.S. 137 (1995), specifies no maximum sentence; by implication, the maximum in all cases may be life imprisonment. *See* 18 U.S.C. § 924(c). Harris thus could have been sentenced to serve seven years even in the absence of the mandatory minimum. *Harris*, 243 F.3d at 809. Accordingly, petitioner's case was governed below not by *Apprendi*, but by *McMillan*. *McMillan* held that a mandatory minimum sentence may be imposed upon facts determined by a judge instead of a jury. 477 U.S. at 87-88. If *McMillan* remains good law, then Harris's sentence is constitutionally unobjectionable. FAMM submit instead that petitioner's sentence should be overturned, *Apprendi* extended, and *McMillan* overruled to correct the deviation in course represented by the *McMillan* decision.

Apprendi represents the Court's most recent commitment to the principle that there is independent constitutional significance to the idea of a criminal "offence," so that constitutionally guaranteed trial rights cannot be eviscerated by clever legislative draftsmanship of the kind seen in section 924(c). This commitment was much in evidence in *In re Winship*, 397 U.S. 358 (1970), where the Court held that: "the Due Process Clause protects the accused against

(cont'd)

Castillo v. United States, 530 U.S. 120 (2000). This brief discusses the constitutional issue which arises if the statute is not so construed.

conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. In response to the state's contention that Samuel Winship's offense was not a crime, but a matter of juvenile delinquency, the Court stressed that, "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." *Id.* at 365.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court pointedly reiterated the principle that constitutional requirements cannot be evaded by mere changes in form:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, *characterizing them as factors that bear solely on the extent of punishment*.

Id. at 698 (emphasis added).

However, the Court has called this principle into question in a number of cases by permitting state legislatures and Congress wide latitude to define criminal offenses, defenses, and "sentencing factors." For example, *Mullaney* required the prosecution to disprove a claim of provocation -- relevant to the traditional line between murder and manslaughter -- beyond a reasonable doubt. Subsequently, the Court deprived *Mullaney* of much of its significance by concluding in *Patterson v. New York*, 432 U.S. 197 (1977), that:

> The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which

> otherwise is within its constitutional powers to sanction by substantial punishment.

Id. at 207-08.[3] Likewise, in *McMillan*, the Court not only authorized state legislatures to convert offense elements into "sentencing factors" with very little constitutional constraint, it went on to emphasize the point by asserting: "We reject the view that anything in the Due Process Clause bars States from making changes in their criminal laws that have the effect of making it easier for the prosecution to obtain convictions." 477 U.S. at 90 n.5.[4]

In *Apprendi* this Court returned to the *Winship-Mullaney* line of cases, and took its most important step to date in enunciating the constitutional definition of a criminal "offence." Offering a standard intended to protect

[3] Whereas *Mullaney* required the prosecution to disprove common-law "heat of passion" or provocation beyond a reasonable doubt, the Court held in *Patterson* that the defendant could be required to prove the constitutionally indistinguishable Model Penal Code defense of "extreme emotional disturbance" by a preponderance. The Court decided that the real defect in *Mullaney*, not present in *Patterson*, was that Maine had shifted to the defenant the burden on an acknowledged element of murder. As the *Patterson* dissenters pointed out, this exercise in labeling was precisely the sort of formalism that *Winship* and *Mullaney* had rejected in their due process analyses. *Id.* at 224-25 (Powell, J., dissenting). Furthermore, *Patterson* was not distinguishable from *Mullaney* on this ground because, as Justice Powell pointed out in his *Patterson* dissent, *id.* at 222 n.4, and as the *Mullaney* court explicitly recognized, 421 U.S. at 689, the Maine court had declared as a matter of state law that "malice aforethought" was not an element of murder, but only a policy presumption underlying its homicide law. Thus, the elements of the offense and defense in Maine were essentially the same as those in New York.

[4] Presumably, the Court took the same view of the Sixth Amendment, given that the convictions at issue in *McMillan* had been challenged on this ground as well.

BEST AVAILABLE COPY

constitutional trial rights from legislative erosion, *Apprendi* holds that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The facts of *Apprendi* did not call for a broader rule. However, the facts of the instant case do, and the Court should not hesitate to declare it. The Court should strengthen *Apprendi*'s rule by extending it to mandatory minimum sentences.

Justice O'Connor's dissent focused on the critical weakness of the *Apprendi* analysis: The legislature need only manipulate the statutory maximum or eliminate it altogether and then use "sentencing factors" to mitigate punishments downward to evade *Apprendi's* holding. 530 U.S. at 540-41 (O'Connor, J., dissenting). In his opinion for the Court, Justice Stevens replied to this argument as he had 15 years earlier in his *McMillan* dissent, suggesting that political constraints will forestall legislatures from increasing statutory maxima to draconian levels across the board. 530 U.S. at n.16; see also *McMillan*, 477 U.S. at 100-02 (Stevens, J., dissenting). Regretably, this prediction has not been borne out, as legislatures have passed laws that authorize or even mandate severe sentences out of all rational proportion to either desert or societal benefit. *See* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 Hastings L.J. 829 (2000) (describing and analyzing draconian punishments imposed in the anti-crime hysteria of the 1980s and 1990s).

For example, the changes made in 1998 to the statute involved in petitioner's case, 18 U.S.C. § 924(c)(1)(A), that eliminated maximum sentences, were effected without political opposition. Congress showed that it can simply eliminate statutory maxima from statutes, and pass new statutes without maximum limits, not merely in theory but in

fact. Congress thus effectively set the maximum sentence for all § 924(c) offenses at life imprisonment, without regard to any moral proportionality between worst-cases -- the traditional function of a statutory maximum. Whatever limits *Apprendi* currently imposes are thus eviscerated.

There is another reason to doubt that political constraints will forestall the erosion of *Apprendi*. The statutory maxima on which the *Apprendi* analysis turns are historical relics -- artifacts of indeterminate sentencing practices now largely abandoned.[5] With the advent of determinate sentences and sentencing guidelines in the 1980s, these statutory maxima now serve little purpose. Parole boards have been abolished and sentencing courts must observe the constraints of sentencing grids in the first instance, with little or no reference to statutory maxima. As Section 924(c)(1)(A) demonstrates, a determinate, guidelines-based sentencing scheme appears to eliminate any need for the traditional maximum sentence. Justice O'Connor's *reductio ad absurdum* of *Apprendi*'s analysis will

[5] As the Court's opinion in the 1949 *Williams* case confidently asserts, penal theory and policy in that era was oriented toward rehabilitation. *Williams v. New York*, 337 U.S. 241 (1949) ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."). The law and institutions of punishment reflected this philosophy: judges set high, indeterminate sentences so that prison and parole officials would have latitude in setting rehabilitative goals and in determining when the offender had met those goals. *See* Marvin Frankel, Criminal Sentences (1974); Alan Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U.Pa.L.Rev 297, 298 (1974). The statutory maxima that traditionally appear in the definitional sections of criminal offenses or in accompanying offense classification statutes are relics of this system: they are the wide upper limits of sentences that judges were to set with a view toward an earlier termination by a parole board.

be fully vindicated by the actual facts, as Congress and state legislatures do away with establishing maximum sentences.

These arguments favor extending *Apprendi*, not abandoning it. *Apprendi* has carried forward the *Winship-Mullaney* standard to define what process is due when legislatures attach penal consequences to facts about wrongdoing. It is true, as Justice O'Connor pointed out, that *Apprendi* is subject to a *reductio ad absurdum*, but so is the competing rule of *McMillan*. Concurring in *Apprendi*, Justice Scalia suggested this competing *reductio* when he wrote:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee ... the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

530 U.S. at 498-99 (Scalia, J., concurring). This is the same danger about which the *Mullaney* court warned when it discussed the lack of constitutional constraints on drafting to convert offense elements into sentencing factors. 421 U.S. at 698. The danger is especially great in the case of mandatory minimum sentences. *McMillan's* "tail which wags the dog" standard cannot suffice. It is not only vague, but it also fails to reflect any principle derived from that case's holding or analysis. To protect the substance of the Sixth Amendment guarantee of trial by jury, the holding of *Apprendi* must be extended to overrule the flawed decision in *McMillan*.

2. *Apprendi's* Terminology Should Be Clarified.

In his *Apprendi* concurrence, Justice Thomas advocated overruling *McMillan* and adopting a rule for the constitutional definition of a criminal offense that is

not constrained by reference to statutory maxima. 530 U.S. at 520-22 (Thomas, J., concurring). In Justice Thomas's formulation, "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast to a fact that mitigates punishment)." *Id.* at 501. Unfortunately, this formulation is vulnerable to the same *reductio ad absurdum* that the *Apprendi* dissenters leveled against Justice Stevens's majority opinion. Almost any aggravating fact for which proof to a jury beyond a reasonable doubt might be required can be committed to the sentencing judge instead by rephrasing that fact as a mitigator of a harsher general maximum. The "imposing or increasing" formulation offers no greater protection against legislative evasion than does the Court's.

The focus should not be on aggravation or mitigation, but instead on the concept that lies behind them: criminal fault. "Criminal fault" refers to those aspects of the offender's wrongdoing which make the conduct blameworthy and which determine the applicable punishment. Because the Constitution guarantees the proof of criminal wrongdoing beyond a reasonable doubt to a jury, it guarantees that each aspect of criminal fault must be proven beyond a reasonable doubt to the jury, regardless of how it may be legislatively labeled.

While aggravating factors can generally be rephrased as mitigating factors, the converse is not true. For example, mental deficiency or disease not amounting to legal insanity is a common ground for mitigating punishment.[6] But there is no meaningful

[6] It appears as a statutory mitigator in most if not all capital punishment schemes. *See, e.g.*, Cal. Penal Code § 190.3(h); Colo. Rev. Stat. §§ 16-11-103(4)(b); N.Y. Crim. Pro. Law §§ 400.27(9)(b); N.C. Gen. Stat. § 15A-2000(f)(6). Mental disease or defect is listed

aggravating converse of this mitigator. Ordinary intelligence or mental health is never viewed as an aggravating factor in sentencing. The term "mitigation", then, sometimes refers to a consideration that has an aggravating converse, but sometimes it does not.[7]

In its attempt to distinguish between offense elements and sentencing factors for constitutional purposes, then, the Court would do well to avoid the terms "aggravation" and "mitigation," and focus on the

(cont'd)

in the original menu of mitigating factors in the Model Penal Code's capital sentencing provision. Model Penal Code § 210.6(4)(g), at 124 (ALI 1985). The draft version of section 210.6 served as the model for most states' redrafting of their capital sentencing statutes following the decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

[7] This ambiguity plays a role in the *Apprendi* opinion, and might account for some of the Court's misplaced confidence in the aggravation/ mitigation distinction. One of Justice Stevens's responses to Justice O'Connor's *reductio* is the argument that "the principal dissent ignores the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation." 530 U.S. 490 n.16. Yet the ease of conversion from aggravation to mitigation is one of the reasons that Justice O'Connor's argument works. The majority countered with an example that does not have an aggravating converse:

> If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone.

Id. Because no judge or legislature would increase punishment on the ground that the offender never has served in the military, a statute that treated veteran status as a sentencing factor would not be vulnerable to Justice O'Connor's argument. That does not show, however, that the argument is generally invalid.

concept of "fault" instead.[8] Fault is an essential aspect of criminal wrongdoing.[9] Two points about fault will demonstrate why it is the superior focal point. First, the most common term associated with criminal fault is "*mens rea,*" but this term is too limiting. *Mens rea* denotes a mental state, while fault is not limited to mental states. Wayne R. LaFave, Criminal Law 224-25 (3d ed. 2000). Negligence, for example, is by definition a style of conduct, not a mental state, but it is a well recognized form of criminal fault. Other examples of objective or non-intentional fault pervading the criminal law include felony murder, transferred intent, intoxication, accomplice liability, unreasonable mistake, and strict liability. In each, fault is to be found, not in a discrete mental state but in a broader set of facts surrounding the offense.[10]

[8] In the matter of a constitutional definition of a criminal offense, the sense of "culpability" or "mitigation" pertaining to eligibility for punishment is not in issue. Sentencing factors are used both to increase and to decrease punishment, which tells us that fault is at issue.

[9] The nature of criminal fault has been the subject of intense scholarly interest in recent years. Much of this work illuminates the nature of objective or non-intentional fault and its relationship to criminal wrongdoing. *See* Kyron Huigens, *Virtue and Inculpation*, 108 Harv.L.Rev. 1423 (1995); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 Wm. & Mary L. Rev. 943 (2000); Dan M. Kahan, *Ignorance of -Law Is an Excuse -- But Only for the Virtuous*, 96 Mich. L. Rev. 127 (1997); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269 (1996); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463 (1992); Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 U.S.C. L. Rev. 953 (1998).

[10] *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo.L.J. 387, 420-23 (2002). For example, strict liability usually is defined as

This Court has recognized the existence of criminal fault beyond *mens rea* on several occasions, notably in *Egelhoff v. Montana*, 518 U.S. 32 (1996). There, the Court held that a state does not violate due process if it prohibits proof of intoxication to negate the mental states of purpose or knowledge in defense of a murder charge. The conviction for murder can, constitutionally, rest on non-intentional fault inferred from the manner and circumstances of the killing, including the defendant's intoxication. See also *Tison v. Arizona*, 481 U.S. 137, 157 (1987).

Second, positive fault considerations should be distinguished from interstitial fault considerations. *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo.L.J. 387, 433 (2002). Positive fault considerations are those so closely related to the wrongdoing that the legislature has mandated their consideration in positive law. Matters such as depraved indifference to human life or

_____(cont'd)
criminal liability without culpability or as criminal liability without proof of a mental state, see, *e.g.*, *United States v. Cordoba-Hincapie*, 825 F.Supp. 485 (E.D.N.Y. 1993) (Weinstein, J.) (invoking both of these definitions), and usually is said to be unjust for precisely these reasons. *See, e.g.*, 1 Model Penal Code and Commentaries, pt. I, § 2.05, cmt. 1, at 283 (ALI 1985). But as the foregoing examples indicate, we impose criminal liability without proof of a mental state in many situations. And in most cases of strict liability, one can identify some fault, usually negligence, somewhere in the transaction. Mark Kelman, *Strict Liability: An Unorthodox View, in* Encyclopedia of Crime and Justice 1512, 1516-17 (1983); Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J.Crim.L. & Crimin. 1075, 1121-22 (1997). The reason that strict liability is unjust is that the prosecution is relieved of the task of proving fault explicitly, while the defendant simultaneously is deprived of any formal avenue of rebutting the inference that he was at fault. In other words, strict liability is objectionable because it violates due process or the principle of legality, not because it is criminal liability without fault.

a purpose to kill are statutory elements of an offense. Interstitial fault considerations bear on the gravity or severity of the wrongdoing, but have not been enacted into positive law, having not been deemed necessary distinguishing features of a type or degree of wrongdoing that the legislature has condemned.

For example, both mercy killings and contract killings are deemed murder, as defined in most if not all jurisdictions, because both exhibit the positive (legal) fault consideration of purpose or premeditation. Yet vastly different circumstances surround the two killings: acceding to the request of a loved one who is in intolerable pain versus making a profit from the cold-hearted killing of a stranger. These surrounding circumstances -- although they generally make an enormous difference in how we evaluate the murders -- are interstitial fault considerations, unless the legislature has, for example, created a separate "mercy killing" category. Even when not enacted by the legislature into law such considerations would bear heavily on how any reasonable judge would approach penalizing the murders. Nevertheless, because taking them into account is not mandated, they are not positive fault considerations. On the other hand, whatever fault considerations are enacted into positive law to control the available range of sentences are subject to the constitutional rule of *Apprendi*.

3. *McMillan* Should Be Formally Overruled.

Clarifying the terminology of culpability and fault in these ways permits one to see why *McMillan* was incorrectly decided. *McMillan* upheld a Pennsylvania statute that imposed a mandatory minimum sentence based on a finding by the trial court that the offender had "visibly possessed a firearm" during the commission

of the offense. 477 U.S. at 80-81 (*citing* 42 Pa.Cons. Stat. § 9712 (1982)).[11] The Court held that the Constitution does not require this finding to be made by a jury. The *McMillan* majority's conclusion, however, was mistaken. To possess a firearm visibly while committing an offense is not merely an aggravating factor under the Pennsylvania statute; it is a matter of positive fault, because the legislature mandated an alteration of the penalty on that particular basis. This precludes, as a constitutional matter, our removing it from the jury's province.

All the members of this Court expressed concern in *Apprendi* about whether a legislative could define as a "motive" and thus as a "sentencing factor" a defendant's state of mind which is within the traditional scope of *mens rea*. This is reflected in the discussion about whether a racial "purpose" could be characterized as a motive instead of a *mens rea*. See *Apprendi*, 530 U.S. at 492 (opinion of the Court); *id.* at 553 (O'Connor, J., dissenting). All the Members of this Court agreed, implicitly, that if a racial purpose were truly a *mens rea*, then it could not be converted into a sentencing factor consistent with due process and the jury trial guarantee. But criminal fault is not confined to mental states. The reasons that lead us consistently to treat mental-state indicators of fault as a necessary part of the offense definition should lead us to treat

[11] The "factor" at issue in *McMillan* was thus akin to, but not the same as, any of the aggravating considerations in 18 U.S.C. § 924(c)(1)(A) at issue here. "Visibly possessing" a firearm, that is "displaying" it or otherwise making its presence apparent, would appear to fall somewhere between a non-aggravated § 924(c) offense, and Harris's alleged offense of "brandishing," which is the first level of aggravation under the federal statute.

objective or non-intentional fault in the same way.[12]

Consequently, *McMillan* was incorrectly decided. Just as *mens rea* cannot be removed from an offense definition without violating the Fifth, Sixth, and Fourteenth Amendments, so other objective or non-intentional fault considerations are subject to the same constraint. The Constitution, properly understood, demands that if Pennsylvania thinks display of a firearm during the commission of an offense indicates a punishable degree of fault that is not reflected in existing law, then Pennsylvania must include visible possession of a firearm in the definition of a new offense or a new degree of an existing offense. So Congress, in amending 18 U.S.C. § 924(c)(1)(A), violated the Constitution if it did not require that "brandishing" a firearm, during and in relation to a crime of violence or drug trafficking offense, be a fact that must be charged in the indictment and proved at trial beyond a reasonable doubt, to be determined by the jury.

This analysis informs a response to the argument at the heart of the majority opinion in *McMillan*. In *Williams v. New York*, 337 U.S. 241 (1949), the defendant had objected, *inter alia*, to the use of uncharged and unproved crimes in his capital sentencing. In rejecting this challenge, the Court reasoned that the trial judge had discretion in the sentencing, and that "no federal constitutional objection would have been possible if the judge had sentenced appellant to death because appellant's trial manner impressed the judge that the appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all." *Id.* at 252.

[12] These reasons are more fully explored in Huigens, 90 Geo. L.J. at 442-53.

This being the case, there could be no constitutional objection to a procedure that made the grounds of Williams' sentence explicit. *Id.* The *McMillan* opinion adopted this line of reasoning:

> Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Pennsylvania has deemed a particular fact relevant and prescribed a particular burden of proof. We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing. Petitioners apparently concede that Pennsylvania's scheme would pass constitutional muster if only it did not remove the sentencing court's discretion, i.e., if the legislature had simply directed the court to consider visible possession in passing sentence. We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.

Id. at 91-92 (citing *Williams*).[13]

The *Williams-McMillan* syllogism is flawed because it ignores the significance of a legislature's decision to enact a particular fault consideration into positive law. Simply because the jury and the judge consider different kinds of

[13] The Court also reasoned:

> The Pennsylvania Legislature did not change the definition of any offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment -- the instrumentality used in committing a violent felony -- and dictated the precise weight to be given that factor if the instrumentality is a firearm.

Id. at 89-90.

fault for different purposes at different phases of the process, it does not follow that the sentencing court can lawfully determine positive fault. Under the Constitution, that power belongs exclusively to the jury. The fact that the legislature has mandated the facts' consideration means that they are inseparable from the wrongdoing in the same way that *mens rea* is indistinguishable from the wrongdoing; they are the circumstances that make the offender's conduct criminal instead of merely undesirable, and which -- the legislature has thus decided -- justify the offender's punishment as a threshold matter.

By rendering its verdict, the jury determines whether any punishment is justified, and in doing so the jury necessarily determines whether the offender is at fault. This fault determination generally turns on an intentional state, and sometimes also on a broader set of facts concerning the manner and circumstances of the wrongdoing. In either event, the jury decides the question of fault because it establishes the justification for punishment. By mandating the adjudication of a particular aspect of the wrongdoing, and assigning it a penalty, the legislature has ensured that the wrongdoing in question will be clearly condemned. The creation of a positive fault provision means this aspect of the wrongdoing is essential to the criminal prohibition and to the justification for punishment. The enactment of a particular fault consideration into positive law is conclusive evidence that it pertains to the jury's function.

In contrast, fault determinations constitutionally made by a sentencing court concern interstitial fault. Its task is to determine the appropriate punishment within legislative bounds. The offender's wrongdoing as determined by the verdict, including his positive fault, is obviously pertinent to this task, but the task of sentencing involves a far broader set of concerns than the jury considers. The number and gradation of facts that might

bear on fault is virtually infinite, and not all of them need be or can be positively enacted into statutory law. These include not only the various ends of punishment, *see* 18 U.S.C. § 3553(a)(2), but also matters more closely concerned with the individual offender, such as his personal capacities and characteristics, the impact of a sentence on his dependents and other third parties, and the possibility of mercy. Among its wide-ranging concerns, the sentencing court addresses interstitial fault.

In setting a sentence, the court goes beyond the jury's delimited determination of wrongdoing and positive fault and considers the manner and circumstances of the particular offense, and the more subtle signs and gradations of fault, as found in the interstices of the positive law. While a legislature must mandate consideration of certain aspects of the wrongdoing in order to define the offense at all, it is not necessary to mandate judicial consideration of particular aspects of the wrongdoing in sentencing. Indeed, as the Court's experience in the constitutional regulation of capital sentencing shows, to do so is likely to have unintended and undesirable consequences.[14]

The distinction between positive and interstitial fault considerations breaks the *Williams-McMillan* syllogism and helps to explain why the Pennsylvania firearm enhancement violated the Constitution -- and thus why the mandatory minimum provisions of 18 U.S.C. § 924(c)(1)(A) are likewise unconstitutional, if not construed as defining

[14] In the constitutional regulation of capital punishment, the Court initially demanded a rule-like approach to death sentencing, with the objective of reducing inequality and arbitrariness. See *Furman v. Georgia*, 408 U.S. 238, 242 (1972); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). Subsequently, when faced with some egregious cases of over-inclusion, the Court demanded the individualized consideration of desert in death sentencing. See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Lockett v. Ohio*, 438 U.S. 586 (1977).

elements of related, graded offenses. The Pennsylvania legislature required trial courts to take the visible possession of a firearm into account in the punishment of certain offenses. In doing so, the legislature expressed its determination that this aspect of the wrongdoing was essential to those prohibitions; that the wrongdoing ought to be particularly condemned in this regard; that others ought to be deterred from acting in this particular way; that the offender's blameworthiness was particularly tied to this point; that, in short, this aspect of the offender's wrongdoing necessarily warranted his punishment. This aspect of the wrongdoing was thus placed in the same functional role as a *mens rea* element. It defined the conduct in question as criminal and not merely undesirable, and was deemed by the legislature to be an indispensable consideration in the question of whether the individual's relationship to society ought to undergo the fundamental transformation that a criminal conviction represents. The legislature should have required such a matter to be pled and proved in the same manner as an essential element of an offense because it *was*, as a constitutional matter, an essential element of an "offence" or "crime," as those terms are used in the Fifth and Sixth Amendments.

The fact that the sentencing court could have considered the visible possession of a firearm in sentencing, even if the legislature had not mandated its consideration, is simply irrelevant. In that event, the display of a firearm would have been among the countless features of the offense that might have been singled out by the legislature, but were not. The details of the firearm's use or possession would then have been interstitial fault considerations, because the legislature did not consider them on a par with the offense elements. Visible possession would have been one of many considerations the sentencing court could take into account in determining punishment -- which, as the Court has said, is

a question that can be decided under different constitutional procedures than the threshold question of guilt or innocence. See *Williams*, 337 U.S. at 252; *accord*, USSG § 6A1.3 (p.s.), and commentary. *McMillan* was wrongly decided, because it failed to guarantee necessary constitutional procedural protections to defendants whose offenses included features so essential to the wrongdoing that the legislature singled them out for punishment.

4. The Mandatory Minimum Sentence Imposed in the Instant Case Should Be Reversed.

For the reasons discussed in this brief, the mandatory minimum sentencing provisions of the statute under which petitioner Harris was convicted and sentenced, 18 U.S.C. § 924(c)(1)(A)(ii) (Supp. IV 1998), are unconstitutional, if not construed as defining separate, aggravated offenses, because they violate Due Process and the Sixth Amendment jury trial guarantee.

The Fourth Circuit, being bound to do so, followed the fallacious reasoning of *McMillan*. Invoking *Williams v. New York*, the court below wrote:

> Because, like the statute at issue in *McMillan*, § 924(c)(1)(A) contains no maximum penalty[15], the government's failure to charge and prove brandishing beyond a reasonable doubt did not expose Harris to a punishment greater than he could have received had the sentencing judge not found that Harris "brandished" a firearm. Even without the "brandishing" finding, Harris could have received a seven-year sentence. In fact, the sentencing judge noted that if we reversed this brandishing ruling, he might nonetheless exercise his discretion and apply a seven-year prison term upon resentencing.

243 F.3d at 808-09.

It is true that, absent the mandatory minimum provision, the sentencing court could have given Harris a seven-year sentence. Far more significant, however, is that in the absence of the mandatory minimum provision the sentencing court could have given Harris less than a seven-year sentence, could have declined to take the brandishing into account, or could have considered Harris's use of a weapon, if at all, in terms other than "brandishing."[16] Were the consequences of a finding of the factor not mandatory, then the particulars of Harris's use of the weapon would have been interstitial fault considerations that the sentencing court might have weighed in the balance with a virtually unlimited number of other considerations.

As matters stand, however, Congress has mandated consideration of whether Harris brandished a weapon and has assigned a particular penal consequence to that finding. Regardless of the statutory form this mandate takes, the fact that it exists makes "brandishing" a positive fault consideration. As such, it implicates not the judge's concern for an appropriate sentence, but rather the jury's to find the violation *vel non* of a particular criminal prohibition that justifies punishment.

---

[15] In fact, the Pennsylvania statute at issue in *McMillan* did "contain," that is, specify, a definite maximum sentence. That maximum was not altered by the facts which triggered application of the mandatory minimum, however.

[16] The files of amicus FAMM are filled with transcripts of sentencings and letters from sentencing judges expressing deep remorse, frustration and regret over having to impose mandatory minimum terms which are objectively unreasonable and inapt in particular cases. *See, e.g.*, FAMMgram, vol. 11, no. 3, at 15 (Fall 2001); other statements are posted at http//www.famm.org.

Because brandishing must be considered under this law, and is not simply one of the unlimited number of factors which "a court of the United States may receive and consider for the purpose of imposing an appropriate sentence," 18 U.S.C. § 3661,[17] brandishing is essential to the offense the legislature has created. It is thus indistinguishable, for constitutional purposes, from a *mens rea* element of the offense. Like *mens rea*, this objective feature of the offense ought to have been charged in a grand jury indictment and proved beyond a reasonable doubt to a jury. Because this essential element was determined instead by the judge, petitioner Harris was improperly sentenced for an offense that was neither charged nor proved. To the extent that Congress intended the statute to create minimum-mandating "sentencing factors," section 924(c)(1) is *pro tanto* unconstitutional. Accordingly, the decision of the Fourth Circuit should be reversed and petitioner's case remanded to the district court for resentencing.

5. Overruling *McMillan* Will Be Minimally Disruptive to Most Contemporary Guideline Sentencing Systems.

The Court might legitimately be concerned about the practical impact of overruling *McMillan* on the foregoing grounds. It might be thought that invalidating uncharged, judge-determined mandatory minimum sentencing would necessarily render unconstitutional all relatively determinate sentencing systems, including that conducted under the Federal Sentencing Guidelines. This is not the case. Nothing in the foregoing analysis would prevent Congress or a state legislature from addressing the issues of discrepancy, inequality, and "truth-in-sentencing" with a guided-discretion sentencing system.

[17] *See also* 21 U.S.C. § 850 (same allowance for sentencing in controlled substance cases).

The contemporary guided-discretion sentencing systems in the states generally involve sentencing grids that suggest a sentence within a relatively narrow range at the intersection of an offense grade and a criminal history score. *See, e.g.*, Rev. Code. Wash. § 9.94A.310 (2001). The specific sentence is determined by a sentencing judge exercising her discretion. *See, e.g.*, Rev. Code Wash. § 9.94A.210(1)(a)(ii) (2001). Such schemes also grant the judge discretion to depart from the prescribed range, and the grounds for departure are not themselves prescribed by guidelines. Instead, they are fully discretionary, although the legislature often provides a list of non-binding sentencing factors for consideration in individual cases. *See, e.g.*, Rev. Code Wash. § 9.94A.390 (2001). Unlike sentences in the *Williams*-type, fully discretionary sentencing systems, see *Dorszynski v. United States*, 418 U.S. 424 (1974), these departures from the sentencing grid are subject to appellate review. *See, e.g.*, Rev. Code Wash. § 9.94A.210(2) (2001). In these systems parole as such is unavailable, and the offender must serve a specified, often large, percentage of the term imposed. See, *e.g.*, Rev. Code Wash. § 9.94A.150 (2001).

None of these state determinate sentencing systems violates the Constitution under the principles described in this brief. The baseline sentencing range is determined by the offense of conviction, all the essential elements of which presumably have been properly charged and proved beyond a reasonable doubt to a jury. The next two stages of sentencing in these systems -- specifying a sentence within the range or departing from the range -- are discretionary. At no point has the legislature done what is impermissible under the analysis presented in this brief, which is to *mandate* the consideration of a particular fault element in sentencing.

The guidelines system adopted under the federal Sentencing Reform Act differs from state determinate or

guided-discretion sentencing schemes in several ways. Yet the United States Sentencing Guidelines themselves do not violate the Constitution under the principles laid out in this brief. Critical to the analysis here, the lower courts have interpreted the Act -- in particular, 18 U.S.C. § 3553(b)[18] -- as mandating a sentence within the properly computed guideline range. That range is based on specified factors that are litigated in the course of sentencing, unless specific findings are made to justify a departure. A less rigid, but perfectly plausible, construction of the Act would readily cure any potential constitutional defect resulting from an interpretation that gives the sentencing judge not only authority but actually the obligation to determine positive fault considerations. Wider acceptance and better understanding of the flexible approach to guideline departures under § 3553(b) elaborated by this Court in *Koon v. United States*, 518 U.S. 81 (1996), but still all too often resisted by the lower courts, would likewise ensure a constitutional application of the guidelines as encouraging a rational approach to interstitial fault considerations, without a usurpation of jury authority.

As the guidelines were originally designed, the district courts were to exercise a substantial degree of discretion comparable to that exercised by judges in state determinate sentencing schemes. Subsequent developments in the evolution of guidelines jurisprudence have obscured this feature of the system, notably an overly strict interpretation of the term "shall" in § 3553(b) -- but these alterations are

[18] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [*i.e.*, that prescribed by the guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

by no means beyond correction. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 Notre Dame L. Rev. 21 (2000). To avoid a constitutional problem (see *United States v. Lopez*, 514 U.S. 549, 562 (1995); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)), the Act could be given its more natural reading -- with the guidelines treated under § 3553(a) as one factor among many to be considered by the court, and section 3553(b) understood as giving the general standards and criteria for departures. For these reasons, a holding that *Apprendi* overrules *McMillan* would not threaten the federal sentencing guidelines.

CONCLUSION

For the foregoing reasons,[**] FAMM urges this Court to overrule the decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). The Court should reverse the judgment of the United States Court of Appeals for the Fourth Circuit

[**] FAMM wishes to express its appreciation to Professor Kyron Huigens for his generous assistance in the preparation of this Brief. The views expressed herein are those of FAMM, however, and not necessarily identical with Prof. Huigens'.

and remand the case with directions to allow petitioner a resentencing.

Respectfully submitted,

MARY PRICE
General Counsel
FAMM Fdtn., Suite 1400
1612 K Street, NW
Washington, DC 20006

(202) 822-6700

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Attorneys for Amicus Curiae

January 24, 2002

Supreme Court U.S.
FILED
FEB 21 2001
OFFICE OF THE CLERK

No. 00-10666

IN THE

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Given that a finding of "brandishing," as used in 18 U. S. C. § 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt?

RECEIVED
MAR 0 8 2002
LIBRARY SERVICES

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 5

I

Stare decisis is an important restraining influence in constitutional law 6

A. The rationale 6

B. *Stare decisis* and the Constitution 10

II

The defendant cannot meet the heavy burden of finding some special justification for overruling *McMillan* 13

A. No special reasons 14

B. Reliance 21

III

Overruling *McMillan* would be difficult to contain in a principled manner 24

Conclusion 29

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U. S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) 9, 20

Almendarez-Torres v. United States, 523 U. S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) 26

Apprendi v. New Jersey, 530 U. S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) ..... Passim

Arizona v. Rumsey, 467 U. S. 203, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984) 10

Clemons v. Mississippi, 494 U. S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990) 16, 17, 26

Dickerson v. United States, 530 U. S. 428, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000) 11, 12, 21

Graham v. Collins, 506 U. S. 461, 122 L. Ed. 2d 260, 113 S. Ct. 892 (1993) 21, 28

Harmelin v. Michigan, 501 U. S. 957, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) 21

Hildwin v. Florida, 490 U. S. 638, 104 L. Ed. 2d 728, 109 S. Ct. 2055 (1989) 16, 26

Hurtado v. California, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111 (1884) 20

Illinois v. Gates, 462 U. S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) 22

Jones v. United States, 526 U. S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) 17, 20

Koon v. United States, 518 U. S. 81, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996) 27

Lee v. Weisman, 505 U. S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) 11

Martin v. Ohio, 480 U. S. 228, 94 L. Ed. 2d 267, 107 S. Ct. 1098 (1987) 19

McMillan v. Pennsylvania, 477 U. S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986) ..... Passim

Michigan v. Chesternut, 486 U. S. 567, 100 L. Ed. 2d 565, 108 S. Ct. 1975 (1988) 15

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) 11, 12

Mullaney v. Wilbur, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975) 16, 22

Patterson v. New York, 432 U. S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977) 15, 16, 19, 22

Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) 6, 10, 11, 12, 21, 22

Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) ... 14, 21

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 39 L. Ed. 759, 39 L. Ed. 821, 15 S. Ct. 673 (1895) 7

Propeller Genesee Chief v. Fitzhugh, 12 How. (53 U. S.) 443 (1852) 14

Rogers v. Tennessee, 532 U. S. 451, 149 L. Ed. 2d 697, 121 S. Ct. 1693 (2001) 8

Sandstrom v. Montana, 442 U. S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979) 28

Seminole Tribe of Fla. v. Florida, 517 U. S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) 13

Smith v. Allwright, 321 U. S. 649, 88 L. Ed. 987, 64 S. Ct. 757 (1944) 8

Staples v. United States, 511 U. S. 600, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994) 22

The Steamboat Thomas Jefferson, 10 Wheat. (23 U. S.) 428 (1825) 14

United States v. Harris, 243 F. 3d 806 (CA4 2001) 2, 3

United States v. Hudson, 11 U. S. 32, 7 Cranch 32, 3 L. Ed. 259 (1812) 22

Vasquez v. Hillery, 474 U. S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986) 8, 13

Vernonia School Dist. 47J v. Acton, 515 U. S. 646, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995) 15

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) 4, 17, 26

Witte v. United States, 515 U. S. 389, 132 L. Ed. 2d 351, 115 S. Ct. 2199 (1995) 17

United States Statutes

18 U. S. C. § 924 ..... 2, 5

21 U. S. C. § 841 2

Treatises

5 W. LaFave, J. Israel, & N. King, Criminal Procedure (2d ed. 1999) 23, 27

Miscellaneous

Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417 (1985) 12

B. Cardozo, The Nature of the Judicial Process (1921) 9

Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422 (1988) 9, 10

The Federalist No. 78 (C. Rossiter ed. 1961) (A. Hamilton) 7

Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68 (1991) 12, 14, 28

Hoffman, *Apprendi v. New Jersey*: Back to the Future?, 38 Am. Crim. L. Rev. 255 (2001) 19, 24

King & Klein, *Apres* Apprendi, 12 Fed. Sent. Rep. 331 (2000) 24

King & Klein, Essential Elements, 54 Vand. L. Rev. 1467 (2001) 20, 25, 27

Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum L. Rev. 723 (1988) 8, 9, 10

Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344 (1990) 7

Powell, Stare Decisis and Judicial Restraint, 47 Wash. & Lee L. Rev. 281 (1990) 8

Priester, Constitutional Formalism and the Meaning of *Apprendi* v. *New Jersey*, 38 Am. Crim. L. Rev. 281 (2001) 27

Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1 (1983) 8, 9, 10, 12

R. Wasserstrom, The Judicial Decision (1961) 11

H. Wechsler, Toward Neutral Principles of Constitutional Law, in Principles Politics and Fundamental Law (1961) 7

IN THE

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Mandatory minimum sentencing provisions are an important tool to limit, but not eliminate, judicial discretion in sentencing. Overruling *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) would void hundreds, if not thousands, of state and

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

federal statutes and the important policy compromises behind them. Such a decision would also threaten many capital sentencing schemes, the Federal Sentencing Guidelines, and its state counterparts. This potential revolution in sentencing law is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant, William Joseph Harris, was a pawn shop owner in North Carolina. *United States* v. *Harris*, 243 F. 3d 806, 807 (CA4 2001). On April 29, 1999, an undercover law enforcement officer and an informant went to Harris' shop to purchase marijuana. See *ibid.* The agent talked with Harris, and then purchased a small amount of marijuana. The next day he purchased an additional 114 grams of marijuana. See *ibid.* Harris wore a 9mm pistol during both transactions. At one point, Harris took the weapon "from its holster and explained that it 'was an outlawed firearm because it had a high-capacity magazine,' and further stated that his homemade bullets could pierce a police officer's armored jacket." *Ibid.*

Harris was arrested and indicted on two counts of unlawful distribution of marijuana, see 21 U. S. C. § 841(a)(1) & (b)(1)(D), and two counts of carrying a firearm in relation to the marijuana offenses, 18 U. S. C. § 924(c)(1). See 243 F. 3d, at 807. Harris pled guilty to one marijuana count. The other marijuana count and one of the weapons counts were dismissed. Harris was convicted on the other weapons count after a bench trial. See *ibid.* At the sentencing hearing, the court held that Harris had "brandished" the pistol under 18 U. S. C. § 924(c)(1)(A)(ii) & (c)(4), and therefore sentenced him to the mandatory minimum term of seven years as prescribed by the statute. *Ibid.*

Harris appealed, and the Fourth Circuit Court of Appeals affirmed, holding that " 'brandished' is a sentencing factor, not an element of the offense." *Ibid.* The court held that *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) was contrary to defendant's argument and had not been overruled by *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). See 243 F. 3d, at 808-809. This Court granted certiorari on December 10, 2001.

SUMMARY OF ARGUMENT

Stare decisis is an important restraining influence in constitutional law. Reliance on precedent gives judicial decisions the impartiality, restraint, and predictability that makes them law rather than the rule of the majority of the current membership of the court. Following precedents thus restrains courts, and can provide the necessary neutral principles upon which to base judicial review. The fact that a precedent is constitutional does not negate the powerful *stare decisis* interests. The reasons for making the Constitution difficult to amend apply equally well to overrulings, which cautions this Court to act with considerable restraint in its constitutional cases.

Constitutional precedent is afforded a strong presumption of correctness by this Court. Rather than a mechanical formula or a mere policy expedient, *stare decisis* is an argument that must be confronted in every case. There must be some special compelling reason beyond the precedent's alleged incorrectness to justify overruling a constitutional decision.

The defendant cannot meet the heavy burden of finding some special justification for overruling *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986). Changed conditions have not undermined its precedential force, nor is *McMillan* unworkable. Although it did not precisely define the constitutional limits on the legislature's ability to allocate the burden of proof in criminal cases, this is far from fatal. The absence of bright-line rules does not diminish a precedent's value, as this Court's Fourth Amendment cases demonstrate. *McMillan* has not proven unworkable because Congress and the states have not abused their authority to define crimes and sentences.

The most substantial objection to *McMillan*'s continued validity, its alleged inconsistency with *Apprendi* v. *New Jersey*, 530 U. S. 446 (2000), fades upon careful analysis. *McMillan* is consistent with a large, coherent body of precedent. Nothing in the *Apprendi* majority opinion requires overruling *McMillan*. A clear distinction can be made between sentencing factors that exceed the statutory maximum and mandatory minimum sentences. Unlike the former, the mandatory minimum provisions in *McMillan* and this case do not create a new offense, and are therefore consistent with the *Apprendi* rule.

The precedential value of *McMillan* must take into account the enormous reliance interest in that decision. While this Court has stated that procedural cases have diminished reliance interests, not all procedural cases are alike. Because only the prosecution must defend its favorable judgments on appeal and on collateral attacks, the government has much greater reliance interests in this Court's procedural cases than criminal defendants.

The reasonable doubt decisions create an even higher reliance interest for government. They involve the heart of the legislative function, defining and punishing crimes. Removing one strand of the intricate web of crime and punishment can cause the whole structure of policy compromises to unravel. Mandatory minimum provisions are an integral part of countless sentencing schemes and the hundreds, if not thousands, of mandatory minimum provisions threatened in this case reflect the compelling reliance interest in *McMillan*.

A final problem with overruling *McMillan* is containing the impact of such a decision in a principled manner. The rationale for such a decision would be that any factor that causes an increase in punishment would have to be proven beyond a reasonable doubt to a jury. This would threaten the rationale of *Walton* v. *Arizona*, 497 U. S. 639 (1990) and a host of other capital sentencing decisions. It would also seriously threaten the Federal Sentencing Guidelines and their state counterparts. Any attempt to contain this damage through *stare decisis* would

appear arbitrary if *McMillan* were overruled. Retaining *McMillan* allows the Court to avoid the unpleasant choice between arbitrariness and a potential revolution in sentencing law.

ARGUMENT

The right of legislatures to define criminal conduct and limit judicial discretion in sentencing is threatened in this case. In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), this Court upheld against constitutional attack a Pennsylvania statute which provided that "anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence if the sentencing judge finds, by a preponderance of the evidence, that the person 'visibly possessed a firearm' during the commission of the offense." *Id.*, at 81. The decision rejected the notion that every fact linked to an increase or decrease in punishment was subject to the reasonable doubt standard. See *id.*, at 84. Because this provision could reasonably be considered a sentencing factor rather than an element of the crime, the due process reasonable doubt requirement was not violated. See *id.*, at 89-90.

The defendant asserts that under *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), the Constitution requires that the brandishing provision of 18 U. S. C. § 924(c)(1)(A) must be proven beyond a reasonable doubt. See Brief for Petitioner 27-30. A necessary part of this argument is that *McMillan* should be overruled, as it has been undermined by *Apprendi*. See *id.*, at 40-45.

The immediate impact of overruling *McMillan* would be momentous itself, as the numerous sentencing statutes enacted in reliance on this decision would be invalidated. In order to overrule *McMillan*, *Apprendi* must be read very broadly. Such a broad reading would dramatically expand judicial review of sentencing schemes and the statutory definition of crimes. In addition to *McMillan*, several other of this Court's precedents,

the Federal Sentencing Guidelines, and their state counterparts are threatened by the defendant's proposed expansion of *Apprendi*. That result would be a "colossal" upheaval for the criminal justice system. See *Apprendi*, 530 U. S., at 551 (O'Connor, J., dissenting).

Apprendi need not and should not be read so broadly as to overrule *McMillan*. In addition to strong *stare decisis* reasons for keeping *McMillan*, *Apprendi* can be interpreted in an appropriately narrow manner that best preserves *McMillan* and other precedents. This is the least disruptive and most natural reading of *Apprendi*.

1. *Stare decisis* is an important restraining influence in constitutional law.

Although occasionally minimized as a dispensable, judicially-created construct, *stare decisis* is part of the law's lifeblood. Reliance on precedent gives judicial decisions the impartiality, restraint, and predictability that makes them law rather than personal whim. While *stare decisis* may have less influence in constitutional than in statutory cases, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), it is still a vital and important restraint in constitutional cases. An examination of the *stare decisis* principle's rationale and its treatment by this Court demonstrates its importance to the present case.

A. The Rationale.

There are many reasons for courts to follow precedent. Perhaps the most important reason is judicial restraint. Relying on earlier decisions helps insure that decisions are based on the rule of law rather than the rule of the majority of current membership of the Court.

> "The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 652 (1895) (White, J., dissenting), overruled in *South Carolina* v. *Baker*, 485 U. S. 505, 524 (1988).

While stability, reliance, and other factors are all important reasons for following precedent, Justice White's dissent points at the overall effect of the doctrine. Relying on the decision of prior courts is an effective restraint upon current and future courts. A constant problem with judicial review is finding neutral principles upon which to base constitutional decisions. If the Court is to be more than a "naked power organ," then its decisions must be controlled by principle. See H. Wechsler, Toward Neutral Principles of Constitutional Law, in Principles Politics and Fundamental Law 3, 27 (1961). "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." *Ibid.*

Precedent is a worthy neutral principle in most cases. "Stare decisis helps reduce this 'counter-majoritarian difficulty' [of judicial review] by requiring the Court to specially justify any overruling decisions, thereby allaying suspicion that the Justices base their decisions upon personal preferences." Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344, 1350 (1990) (footnotes omitted). This convinced the Founders when they established the Judicial Branch. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ." The Federalist No. 78, p. 471 (C. Rossiter

ed. 1961) (A. Hamilton). This view also reflects the common law's heavy reliance upon *stare decisis*. See *Rogers* v. *Tennessee*, 532 U. S. 451, 473, and n. 2 (2001) (Scalia, J., dissenting).

This Court is similarly disposed towards judicial restraint. "That doctrine [*stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986). Justice Powell expressed similar sentiments. "But the elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is. This would undermine the rule of law." Powell, Stare Decisis and Judicial Restraint, 47 Wash. & Lee L. Rev. 281, 288 (1990).

Insufficient respect for *stare decisis* thus threatens the public legitimacy of the Court and its decisions. Adherence to precedent helps assure the public that the Court rules impartially. See Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1, 2 (1983). A perception that places the "adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and this train only," *Smith* v. *Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting), can only add to the unfortunate public cynicism about the political nature of constitutional law. See Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum L. Rev. 723, 753 (1988).

Judicial restraint is a theme that runs through the traditional rationales for *stare decisis*. The common justifications for adhering to precedent—reliance, equality, and efficiency—are all closely related to judicial restraint. By assuring the public that judges will rule impartially, *stare decisis* allows individuals to order their affairs around precedents. See Stevens, *supra*, 58 N. Y. U. L. Rev., at 2. Equality is also served, as restraining judges through precedent ensures that similar cases will be treated similarly, rather than according to idiosyncracies of the

individual judges. *Id.*, at 2-3, n. 12 (quoting W. Douglas, Stare Decisis 8 (1949)). Even efficiency, the idea that precedents relieve judges of the task of having to reinvent the wheel with each new decision, see B. Cardozo, the Nature of the Judicial Process 149-150 (1921), is a form of judicial restraint. Efficiency is advanced through reliance on precedent by allowing the judge to defer to the accumulated wisdom of his or her predecessors. See Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 422-423 (1988). "Precedent not only economizes on information but also cuts down on idiosyncratic conclusions by subjecting each judge's work to the test of congruence with the conclusions of those confronting the same problem." *Id.*, at 423.

This "conservative, stabilizing force," see Monaghan, 88 Colum. L. Rev., at 751, plays an important role in restraining constitutional decisions. Although this Court has stated that *stare decisis* is less important in constitutional cases because the Constitution is so difficult to amend, see, *e.g.*, *Agostini* v. *Felton*, 521 U. S. 203, 235 (1997), *stare decisis* is much more than an easily dispensable policy in constitutional cases. If anything, stability is needed even more in our most important body of law.

Two reasons why the Constitution is difficult to amend are because the Framers sought to "ensure that a super-majority of the people supports any constitutional rule . . . at the time of inception" and "to ensure stability in the structure of government." Easterbrook, 73 Cornell L. Rev., at 430. Weakening precedent in constitutional cases frustrates both values. "People who seek amendment know that the Court may change the rules at any moment, making their campaign unnecessary or even counterproductive (depending on the new rules the Court supplies). . . . The Court's emphasis on the difficulty of amending the Constitution therefore may lead paradoxically to an increased difficulty in securing a change." *Id.*, at 430-431.

The instability caused by frequent overruling of constitutional precedent is equally apparent. See *id.*, at 431. "Precisely

because constitutional rules establishing governmental structures, because they are the framework for all political interactions, it ought to be *harder* to revise them than to change statutory rules. The reasons for making amendment hard apply as well to overrulings." *Ibid.* (emphasis in original).

While it is too late to elevate constitutional *stare decisis* in relation to its statutory counterpart, constitutional precedents still deserve considerable respect. If we are to "contain, if not minimize, the existing cynicism that constitutional law is nothing more than politics carried on in a different forum," see Monaghan, 88 Colum. L. Rev., at 753, then the Court must act with considerable restraint in its constitutional cases. That restraint is best served by a strong presumption in favor of adhering to precedents, even in constitutional cases. This principle finds considerable support in this Court's precedents.

B. Stare Decisis and the Constitution.

While *stare decisis* may have more strength in statutory cases, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), constitutional precedent is still afforded a strong presumption of correctness by the Court. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). *Stare decisis* is the normal state of affairs in this Court's decisions. Out of the thousands of cases on its docket "over and over again the Court's action involves nothing more than the application of old precedent to a new controversy." Stevens, 58 N. Y. U. L. Rev., at 4. At most, two to three decisions each year involve overruling precedents. As the ever-increasing complexity of the law creates more opportunities for precedents to conflict, this small proportion of overrulings demonstrates the continuing vitality of *stare decisis*. See *id.*, at 4-5. Indeed, overruling a precedent, even a constitutional one, is an "exceptional action." *Rumsey*, 467 U. S., at 212.

Rather than a mechanical formula or a mere policy expedient, *stare decisis* is an argument that must be confronted in every case.

> "It is possible, without talking about the need for predictability, the fact of reliance, the prevention of legal error, and the like, to notice that when viewed as *reasons*, precedents by themselves constitute justifications that require confrontation before they may be sensibly disregarded or altered. . . . As such, they carry their own prima facie claim for acceptance." R. Wasserstrom, The Judicial Decision 83 (1961) (emphasis in original).

The doctrine carries a substantial "persuasive force," in every case. See *Payne*, 501 U. S., at 842 (Souter, J., concurring). Therefore, where the law is settled "we should stick to it absent some compelling reason to discard it." *Lee* v. *Weisman*, 505 U. S. 577, 611 (1992) (Souter, J., concurring).

Dickerson v. *United States*, 530 U. S. 428 (2000) provides an example of these principles in action. Although *Miranda* v. *Arizona*, 384 U. S. 436 (1966) might have been decided differently by the members of the *Dickerson* Court, this decision was not overturned in spite of a longstanding invitation to do so from Congress. "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson*, *supra*, at 443. As in *Rumsey* and other cases, departure from this constitutional precedent required some "special justification." See *ibid.* (internal quotation marks omitted). Following Justice Souter's concurrence in *Payne*, this is derived from the inherent persuasive force of precedent. See *ibid.*

The *Dickerson* Court did not overrule *Miranda* in spite of strong reasons for overturning the decision. *Miranda* was decided over spirited dissents and remains controversial to this day. As the dissents noted, it was "poor constitutional law," *Miranda*, 384 U. S., at 504 (Harlan, J., dissenting), and was

devoid of historical support. See *id.*, at 526 (White, J., dissenting). The *Miranda* test had its own administrative difficulties, and more importantly, extracted a fearful societal toll in suppressed voluntary confessions. In addition, it was based on a faulty premise, that police interrogation practices too often failed to comply with Fifth Amendment and Due Process requirements. See Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1443-1444 (1985). Yet *Miranda* was not overruled. The warnings had found wide acceptance in our culture, while subsequent decisions had reduced *Miranda*'s impact on law and reaffirmed its core values. See *Dickerson*, 530 U. S., at 443-444. Additionally, *Miranda* was as workable as the alternative, "the totality of the circumstances test" of 18 U. S. C. § 3501. See *id.*, at 444.

Society had developed expectations around *Miranda*, the decision was not undercut by subsequent developments in the law, and it worked. These principles form the basis of most of this Court's constitutional *stare decisis* analysis. This Court generally does not overrule a case unless at least one of three reasons are present: "changed conditions, the lessons of experience (including unworkability), and conflicting precedents." Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 109 (1991). The strength of *stare decisis*' presumption of correctness, see Stevens, 58 N. Y. U. L. Rev., at 8, is influenced by additional factors. The reliance interest in a precedent plays an important role in determining how much justification is necessary to overcome the presumption of correctness. For example, decisions limiting the prosecution's case in the sentencing phase of capital trials had diminished *stare decisis* protection as there was no legitimate reliance interest in those decisions. See *Payne*, 501 U. S., at 828. When overturning a decision would "risk . . . undermining public confidence in the stability of our basic rules of law," see Stevens, 58 N. Y. U. L. Rev., at 9, then the argument for following the precedent is strengthened.

Although these factors guide the Court's analysis, there is no simple formula for determining the strength of a precedent.

> "Our history does not impose any rigid formula to constrain the Court in the disposition of cases. Rather, its lesson is that every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986).

If *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) is to be overruled, it is not enough to simply claim that the case was wrongly decided. At the very least, *McMillan* must be proven "to be unworkable or to conflict with later doctrine or to suffer from the effects of facts developed since its decision (apart from those indicating its original errors)." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 183 (1996) (Souter, J., dissenting). Even if there is some special justification for departing from *McMillan*, sufficiently strong reliance interests or the public's confidence in the stability of our system may yet preserve the case. In light of these significant hurdles, there is no case for extending *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) to overrule *McMillan*.

II. The defendant cannot meet the heavy burden of finding some special justification for overruling *McMillan*.

Extending *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) to overrule *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) is not justified under any principled application of *stare decisis*. *McMillan* is not "outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." See *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986). Other facts only strengthen *McMillan*'s value as precedent. Numerous mandatory minimum statutes have been enacted in reliance on *McMillan*. The invalidation of these statutes and the further

disruption of sentencing law that would attend this expansion of *Apprendi* threaten to erode public confidence in the law and this Court's decisions.

A. No Special Reasons.

None of the three most common reasons for departing from precedent—changed conditions, unworkability, or conflicting precedents, see Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 109 (1991); see also *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854-855 (1992)—apply to *McMillan*. No new circumstances have undermined *McMillan*. An illustration of this ground is found in *Propeller Genesee Chief* v. *Fitzhugh*, 12 How. (53 U. S.) 443 (1852). That case involved a technological innovation. The invention of the steamboat and the subsequent commercial development of inland rivers had effectively changed the definition of public navigable river, and therefore the limits of the admiralty power. See *id.*, at 455-457. The decision relying on the now-obsolete definition, *The Steamboat Thomas Jefferson*, 10 Wheat. (23 U. S.) 428 (1825), had to be overruled. See *Propeller Genesee*, *supra*, at 456. The only significant change since *McMillan*, the many mandatory minimum sentencing statutes enacted in reliance on that decision, see part II B, *infra*, only strengthens its precedential value.

Nor is *McMillan* unworkable. While some may disagree with the desirability of mandatory minimum sentences, their execution is comparatively straightforward in the context of modern sentencing law. The only possible difficulty in administering *McMillan* is its recognition that the Constitution still prevented legislatures from evading the reasonable doubt standard by manipulating the distinction between the underlying offense and the sentence. The *McMillan* Court did not "define precisely . . . the extent to which due process forbids the reallocation or reduction of burden of proof in criminal cases . . . ." 477 U. S., at 86. An imprecise exception to a general

rule does not render the rule unworkable. If simple imprecision determined a rule's practicality, then *stare decisis* would virtually cease to exist in a Fourth Amendment jurisprudence driven by a reasonableness standard. Cf. *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652-653 (1995) (reasonableness standard); *Michigan* v. *Chesternut*, 486 U. S. 567, 572-573 (1988) (eschewing "bright-line" rules in seizure cases). "Our inability to lay down any 'bright-line' test may leave the constitutionality of statutes more like those in *Mullaney* [v. *Wilbur*, 421 U. S. 684 (1975)] and *Specht* [v. *Patterson*, 386 U. S. 605 (1965)] than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results." *McMillan*, 477 U. S., at 91.

The *McMillan* standard has not proven unworkable, because Congress and the states have not abused their authority to define crimes and sentences. Legislatures do not strip out the elements from crimes and convert them into mandatory minimum factors to be proved by a preponderance of the evidence at the sentencing phase. While there may be many mandatory minimum sentencing statutes, see part II B, *infra*, they have not pushed the edge of what is permissible under *McMillan*. *McMillan*'s generally deferential standard poses no administrative problems.

The most substantial objection to *McMillan*'s continued validity, its alleged inconsistency with *Apprendi*, fades upon careful analysis. *McMillan* is not an aberrant departure from settled practice. Rather it is part of a large and ongoing body of law recognizing that legislatures have considerable, but not unlimited, leeway in defining crimes and punishments. The *McMillan* line begins with *Patterson* v. *New York*, 432 U. S. 197 (1977). *Patterson* reflected the necessity of giving legislatures considerable leeway in defining crimes. While the historical treatment of defenses to homicide was relevant to its analysis of placing the burden of proof for the severe emotional stress defense, see *id.*, at 202-203, the structure of New York's

homicide law was critical to finding no due process violation. Because the statute providing the affirmative defense did not change the prosecution's burden of proving the elements of murder beyond a reasonable doubt, there was no due process violation. See *id.*, at 205-206. The Constitution was satisfied because "[i]t is plain enough that if the intentional killing is shown, the State intends to deal with the defendant as a murderer unless he demonstrates the mitigating circumstances." *Id.*, at 206. Finally, the *Patterson* decision provided further justification for *McMillan* when it dismissed the argument that *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975) required the State "to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability.' " See *Patterson*, *supra*, at 214, n. 15.

McMillan flowed from this decision. There was no due process violation because the mandatory minimum sentence provision did not change the prosecutor's burden of proving the underlying crime. Since the sentencing provision was not an element of the underlying offense, *Patterson* controlled. See *McMillan*, 477 U. S., at 85-86. *McMillan* was thus not an aberration, but rather the logical extension of *Patterson*'s deference to the States and Congress.

McMillan was not viewed as an aberration after it was decided. This Court has consistently relied on *McMillan*. In *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*), this Court relied on *McMillan* to hold that the Sixth Amendment did not require the jury to specify the aggravating factors that permit the jury imposition of capital punishment in Florida. As in *McMillan*, the "aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.' " *Id.*, at 640 (quoting *McMillan*, 477 U. S., at 86). In *Clemons* v. *Mississippi*, 494 U. S. 738, 746 (1990), *McMillan* and *Hildwin* were invoked to support the holding that the Sixth Amendment did not invalidate a death sentence where an appellate court had invalidated one of the aggravating factors, but affirmed the death sentence after finding that the remaining aggravating

factors outweighed the mitigating evidence. See *id.*, at 745-746. *Hildwin* and *Clemons* were in turn invoked to uphold, against a Sixth Amendment challenge, an Arizona law allowing the court to determine the aggravating fact necessary for eligibility for the death penalty. See *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990). *McMillan* is also important in non-capital sentencing. *Witte* v. *United States*, 515 U. S. 389, 391 (1995) addressed whether the Double Jeopardy Clause prevented a court from "convicting and sentencing a defendant for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous conviction." *McMillan* was cited as one of several cases that "reinforce our conclusion that consideration of information about the defendant's character and conduct at sentencing did not result in 'punishment' for any offense other than the one for which the defendant was convicted." *Id.*, at 401.

Up to *Apprendi* and its nonconstitutional precursor, *Jones* v. *United States*, 526 U. S. 227 (1999), *McMillan* was important and unquestioned. While *Apprendi*'s historical, formalistic approach can be read to create analytical difficulties for *McMillan*, this does not rise to the level of inconsistency that justifies the dramatic step of overruling a precedent. *Apprendi* specifically declined to overrule *McMillan*, reserving that issue for another time. See 530 U. S., at 487, n. 13. Instead, the *Apprendi* Court chose not to give an expansive reading to *McMillan*. "We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself." *Ibid.*

As this suggests, *McMillan* and *Apprendi* can coexist in the same body of precedent. A clear analytical distinction can be drawn between statutes that limit court's discretion *within* the range of statutorily defined sentences for the crime, as in *McMillan* and the present case, and the situation in *Apprendi*,

where the sentencing factor allowed the judge to give a sentence for a crime that is *higher* than one described in the statute.

Another *Apprendi* footnote further supports retaining *McMillan*. Although the *Apprendi* Court questioned the historical basis of *McMillan*'s use of the term "sentencing factor," see *id.*, at 485, 494, n. 19, it recognized that this term had meaning. "The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Id.*, at 494, n. 19 (emphasis in original). By increasing the maximum possible sentence, the hate crime "sentencing factor" in *Apprendi* created the "functional equivalent" of a new "greater offense," see *ibid.*, effectively distinguishing itself from *McMillan*'s mandatory minimum.

This distinction is crucial to the *Apprendi* decision. In addition to its historic basis, *Apprendi* also serves "powerful interests" in the way it protects due process and the right to jury trial. See *id.*, at 495. "The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." *Id.*, at 495.

Apprendi is thus best read as a structural decision. Whenever a legislature enacts a new crime it makes a policy decision. *Apprendi* holds that this decision cannot be hidden under the guise of a "sentencing factor." As the majority noted:

> "structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged 'to make its choices concerning the substantive

> content of its criminal laws with full awareness of consequences, unable to mask substantive policy choices' of exposing all who are convicted to the maximum sentence it provides." *Id.*, at 490-491, n. 16 (emphasis in original) (quoting *Patterson*, 432 U. S., at 228-229, n. 13 (Powell, J., dissenting)).

This passage also demonstrates that *McMillan*'s continued existence will not eviscerate the *Apprendi* rule. Contrary to the defendant's arguments, see Brief for Petitioner 37-39, legislatures will not craft baroque evasions of *Apprendi* through the use of mandatory minimums, because neither the States nor Congress play games with the criminal law. While legislatures have had little time to respond to *Apprendi*, history demonstrates that the *Apprendi* majority was correct to place its faith in the collective wisdom of our political representatives.

The response to *Patterson* is illuminating. The States and Congress have not come close to pushing the limits of *Patterson*'s deference to legislative definition of affirmative defenses. Contrary to fears of the *Patterson* dissenters that legislatures would shift elements of crime to affirmative defenses, see *Patterson*, 432 U. S., at 223, 224 (Powell, J., dissenting), "the worst never actually occurred." See Hoffman, *Apprendi v. New Jersey*: Back to the Future?, 38 Am. Crim. L. Rev. 255, 272 (2001). Aside from the insanity defense, very few criminal statutes have been rewritten to take advantage of *Patterson*. See *id.*, at 272-273. Even after *Martin* v. *Ohio*, 480 U. S. 228, 233 (1987) in which the state was allowed to shift the burden of proof of self-defense to the defendant, legislatures still did not exploit this newly won freedom and attempt to strip the traditional elements from crimes by placing them in new affirmative defenses. See Hoffman, 38 Am. Crim. L. Rev., at 273-274.

Apprendi's holding is clearly stated in a reference it makes to *McMillan*. "When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a

tail which wags the dog of the substantive offense.' " *Apprendi*, 530 U. S., at 495 (quoting *McMillan*, 477 U. S., at 88). The *Apprendi* majority recognized that not every fact which influences a sentence has to be determined by a jury. "We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating to the offense and the offender—in imposing sentence within the *range* prescribed by statute." *Id.*, at 481 (emphasis in original). As *Apprendi*'s analytical predecessor stated, "It is not, of course, that anyone today would claim that every fact bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution." *Jones*, 526 U. S., at 248. *McMillan* and other legislative efforts to guide judicial sentencing discretion through mandatory minimum sentences are consistent with these principles.

Any actual tension between *McMillan* and *Apprendi* relates to their respective reliance on history. The *Apprendi* decision did place significant emphasis on the fact that, historically, facts that increased the maximum sentence for the crime were treated as elements that had to be pled and proved before a jury. See 530 U. S., at 477-483. The mandatory minimum schemes of *McMillan* and the present case have no clear historical precedents. Neither the common law nor 19th century practice guided the sentencer's discretion in the manner contemplated by modern practice. See King & Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1474-1477 (2001). The fact that there is no historical analog does not itself constitute a due process violation. See *Apprendi*, 530 U. S., at 483; *Hurtado* v. *California*, 110 U. S. 516, 529 (1884) (holding all procedural change unconstitutional "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement"). Whatever historical tension that may exist between *McMillan* and *Apprendi* is not enough to render them incompatible.

Apprendi did not directly contradict *McMillan*. Nor has it fatally undermined *McMillan*'s premises. Cf. *Agostini* v.

Felton, 521 U. S. 203, 226 (1997) ("premises on which we relied . . . no longer valid"). This Court has countenanced far greater tension between its precedents without resorting to the drastic step of overruling one of its decisions. See, *e.g.*, *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring) (discussing tensions between Eighth Amendment guided discretion and mitigating circumstance cases); *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (describing tensions between *Rummel* v. *Estelle*, 445 U. S. 263 (1980) and *Solem* v. *Helms*, 463 U. S. 277 (1983)). While the *Apprendi* majority might have reached a different conclusion had it addressed the *McMillan* issue in the first instance, that does not justify overruling *McMillan*. See *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). *McMillan*'s "underpinnings [are] unweakened in any way affecting its central holding." See *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 860 (1992). It is not unworkable, it is not "at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered [the statutory maximum for the offense] more or less appropriate as the point at which the balance of interests tips." See *id.*, at 860-861. In short, there are no special reasons for overruling *McMillan*.

B. Reliance.

The precedential value of *McMillan* must take into account the enormous reliance interest in that decision. Cf. *Apprendi*, 530 U. S., at 487, n. 13 (recognizing reliance interest in *McMillan*). Although this Court has stated that procedural and evidentiary cases warrant less *stare decisis* protection due to the diminished reliance interests in them, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), all procedural cases are not alike. It is true that criminal defendants rarely have any legitimate reliance interest in decisions granting them procedural rights. For example, no individual can in any reasonable sense rely on a rule limiting the use of victim impact evidence in the sentenc-

ing phase of a capital murder trial. Cf. *id.*, at 818-819 (describing *Booth* v. *Maryland*, 482 U. S. 496 (1987) and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989)); *id.*, at 828 (lack of reliance interest).

Criminal defendants have far less reliance interests in precedents than the government due to the asymmetrical appellate rights of the two. Only the prosecution needs to defend its judgments on appeal or collateral attack. A defendant who relies on an existing procedure at trial is acquitted, and the Double Jeopardy Clause protects him from reversal on appeal. Only in exceedingly rare instances, such as the use of immunized testimony, could a defendant have a legitimate reliance interest.

Governments, however, can and do rely on this Court's procedural decisions. Police officers will rely on this Court's sanction for interrogation or search practices, and prosecutors will develop cases, present evidence, and file charges based on procedural decisions. The reasonable doubt decisions create an even higher reliance interest.

These decisions typically involve basic regulation of human conduct, whether through the definition of murder and manslaughter, see *Mullaney* v. *Wilbur*, 421 U. S. 684, 691-692 (1975), defenses to murder, see *Patterson* v. *New York*, 432 U. S. 197, 200-201 (1977), or the punishment for crimes, see *McMillan*, 477 U. S., at 81; *Apprendi*, 530 U. S., at 474. Defining and punishing crime lies at the heart of the legislative function. As the *Patterson* Court noted, dealing with crime is primarily a state prerogative and therefore "we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." 432 U. S., at 201. In the federal system, Congress has the predominant role defining and punishing crimes. See *United States* v. *Hudson*, 7 Cranch (11 U. S.) 32, 34 (1812) (no federal common law criminal jurisdiction); *Staples* v. *United States*, 511 U. S. 600, 604-605 (1994). As individual security is the most important government function, see *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983), the government reliance is particularly important when defining and punishing crime.

These essential policy decisions are not discrete. The definition of a particular crime, its lesser and greater offenses, any defenses, and all relevant punishment statutes form a closely interrelated web of policy decisions. Remove a strand, and the entire web of compromises threatens to unravel.

A mandatory minimum sentence provision is not some easily discarded excess component of a statute. It is "a form of determinate sentencing designed to control the discretion of judges and parole boards and advance the goals of deterrence and incapacitation." 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.3(c), p. 735 (2d ed. 1999). If *McMillan* is overruled, then the relationship that Congress and the state legislatures set between crime and punishment is broken for those punishments containing mandatory minimum provisions. The calculus between culpability and desert will have to be recalibrated. Lacking this tool to limit judicial discretion, legislatures might revert to strictly determinate sentencing. They might change the sentences for the crime, or they may create a new crime with the triggering event for the mandatory minimum.

No matter how Congress and the states respond, overruling *McMillan* will undo carefully built compromises between culpability, punishment, and judicial discretion made in reliance on this Court's precedents. Since *McMillan* is almost 16 years old, many legislative decisions have been made in reliance on this decision. *Amicus* will not recount in detail the hundreds, if not thousands of mandatory minimum provisions threatened by overruling *McMillan*, other than noting that all 50 states have mandatory minimum provisions, and that one recent survey listed over 60 mandatory minimum provisions for federal crimes. See *id.*, § 26.3(c), at 736 & n. 14.

Apprendi has already caused considerable disruption to the criminal justice system. "In the year since the Court's opinion,

more than four hundred federal and state court decisions have dealt with *Apprendi* issues, and a recent article in the Federal Sentencing Reporter listed forty-eight federal statutes that either have been or may soon be challenged under *Apprendi*." Hoffman, *Apprendi v. New Jersey*: Back to the Future? 38 Am. Crim. L. Rev. 255, 255 (2001) (footnotes omitted); King & Klein, *Apres* Apprendi, 12 Fed. Sent. Rep. 331, 336-338 (2000) (Appendix A) (listing federal statutes threatened by *Apprendi*). Such disruption was tolerable because Congress and the states did not enact these provisions in reliance on a precedent of this Court. Although the vigorous and well-reasoned *Apprendi* dissents showed that a strong case could be made for their constitutionality, these sentencing provisions never had the explicit sanction of this Court. Indeed, even the *McMillan* decision recognized that sentencing factors that authorized exceeding the statutory maximum sentence raised a more significant constitutional issue than the mandatory minimum it upheld. See *McMillan*, 477 U. S., at 88.

Where countless statutes involving the most important government action have been enacted in reliance on a Supreme Court decision directly on point, then the *stare decisis* protection for that decision is deservedly substantial. Mandatory minimums may not be universally popular, but that is not enough to justify overturning *McMillan*. The combination of substantial reliance and lack of any special reason for overturning *McMillan* make a compelling case for retaining this decision. Any remaining doubts about *McMillan*'s continued validity are resolved by considering the effect such a decision would have on other parts of the law.

III. Overruling *McMillan* would be difficult to contain in a principled manner.

A final problem with overruling *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) is containing the impact of such a decision in a principled manner. While overruling *McMillan* would

itself create enormous disruption, see part II B, *ante*, at 21, the threat to sentencing law is not confined to invalidating mandatory minimum sentencing schemes. The reasoning behind any decision striking down *McMillan* would necessarily implicate many other aspects of sentencing, including some death penalty systems and the Federal Sentencing Guidelines.

As there is nothing fundamentally inconsistent between *McMillan* and a normal reading of the narrow rule of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), see *ante*, at 17-20; King & Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1478 (2001), the analytical force for overruling *McMillan* must come from outside the four corners of the *Apprendi* majority opinion. The potential sources for departing from the *McMillan* rule are the *McMillan* dissents and Justice Thomas' *Apprendi* concurrence. Each of these opinions would, if adopted by a majority of this Court, considerably expand the scope of the Due Process Clause with respect to the legislative power to define and punish crimes.

The narrowest expansion of due process comes from Justice Stevens' dissent in *McMillan*. This opinion would hold that

> "if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship* [397 U. S. 358 (1970)]." *McMillan*, 477 U. S., at 103 (Stevens, J., dissenting).

Justice Marshall's dissent left open the possibility that mitigating facts might also be subject to *Winship*'s reasonable doubt requirement. See *id.*, at 94 (Marshall, J., dissenting). Justice Thomas' concurrence in *Apprendi* draws from 19th century and common law treatment of the elements of crime, and reaches a result similar to Justice Stevens' dissent in *McMillan*.

> "This authority establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). . . . One

need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled to for a given set of facts. Each fact necessary for that entitlement is an element." *Apprendi*, 530 U. S., at 501 (Thomas, J., concurring).

At the very least, *Walton* v. *Arizona*, 497 U. S. 639 (1990) and *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998) would be endangered under any of these approaches. *Walton* held that having a judge rather than a jury find the aggravating factor necessary for death penalty eligibility did not violate the Sixth Amendment. See 497 U. S., at 649. The *Walton* Court rejected the defendant's claim that " 'the Constitution requires that a jury . . . make the findings prerequisite to imposition of' " the death penalty. *Id.*, at 647 (quoting *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990)). This holding is difficult to square with any of the opinions advocating the overruling of *McMillan*. It is possible that the special requirements imposed on the states by this Court's Eighth Amendment cases might justify distinguishing *Walton* from a broad reading of *Apprendi*. See 530 U. S., at 523 (Thomas, J., concurring). Since this would involve treating capital defendants less deferentially than noncapital convicts, the distinction would be strained.

At the very least, *Walton* will be seriously threatened. If it is overruled, it is difficult to see how the other capital cases relying on *McMillan*, *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*) and *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), see *ante*, at 16-17, could withstand this tide.

Noncapital sentencing would also be upset by a decision overturning *McMillan*. All of the approaches advocating the removal of *McMillan* would likely sweep away *Almendarez-Torres*. The fact that prior criminal conduct is a fact traditionally relegated to sentencing, see 523 U. S., at 243-244, does not change the fact that in *Almendarez-Torres* recidivism was used to increase the maximum sentence, *id.*, at 226, and therefore would have to be an element of the crime. See *Apprendi*, 530 U. S., at 521 (Thomas, J., concurring).

More importantly, the Federal Sentencing Guidelines and their state counterparts would be threatened by an opinion overruling *McMillan*. The Guidelines are permissible under the narrow rule of the *Apprendi* majority because the sentencing matrix is never invoked to increase a punishment beyond the statutory maximum. See Priester, Constitutional Formalism and the Meaning of *Apprendi* v. *New Jersey*, 38 Am. Crim. L. Rev. 281, 290 (2001). However, if any fact that increases a punishment within the prescribed range of punishments must also be treated as an element, then the Guidelines are in serious jeopardy. See King & Klein, 54 Vand. L. Rev., at 1483-1484. The *McMillan* opponents assert that the mandatory minimum enhancement was an element because

> "the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum 'entitl[es] the government' . . . to more than it would otherwise be entitled (5 to 10 years rather than 0 to 10 years and the risk of a sentence below 5)." *Apprendi*, 530 U. S. at 422 (Thomas, J., concurring).

It is difficult to reconcile the Guidelines with this reasoning.

The Guidelines utilize a wide variety of aggravating and mitigating facts to determine an offense level and criminal history category. These are then used to find the presumptive sentence from the Sentencing Commission's sentencing table. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.3(e), pp. 738-739 (2d ed. 1999). Therefore, under the Guidelines facts not pled and proven beyond a reasonable doubt to a jury are used to aggravate the potential punishment. Although courts may impose a lesser or greater sentence than what the Guidelines presume, that departure must be independently justified, and is subject to appellate review, see *id.*, § 26.3(e), at 740-741; *Koon* v. *United States*, 518 U. S. 81, 96-100 (1996). This is not likely to satisfy an opinion overruling *McMillan*. The reasonable doubt requirement cannot be

avoided through the use of presumptions, even rebuttable ones. See *Sandstrom* v. *Montana*, 442 U. S. 510, 524 (1979).

Amicus does not assert that all of these decisions and practices would necessarily be struck down if *McMillan* is overturned. At the very least, *stare decisis* could play an important role limiting the disruption. However, since any decision overturning *McMillan* must reject *stare decisis* in that case, any subsequent reliance on *stare decisis* will appear arbitrary.

If *McMillan* is overturned, this Court will be faced with the choice of a monumental change in sentencing law, strained attempts to distinguish the overturning decision, or the arbitrary use of *stare decisis*. This result could also threaten *Apprendi* in the long term. *Apprendi* caused considerable disruption, and was a 5-4 decision made over vigorous dissents. If given the expansive construction discussed in this section, rather than the narrow, literal reading discussed in part I A, then *Apprendi* will also be inconsistent with a large body of this Court's decisions. The resulting disruption will lead to ongoing litigation in order to determine how much modern sentencing law must be remade by this Court's decision.

One final virtue of *stare decisis* is that it helps preserve those decisions that rely on its virtues. If a court respects precedent, then it increases the chance that future courts will follow suit. See Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 71 (1991). The converse is equally true. Decisions that do not respect precedent will receive less deference. "When a single holding does so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, it cannot command the force of *stare decisis*." *Graham* v. *Collins*, 506 U. S. 461, 497 (1993) (Thomas, J., concurring). The best way to preserve *Apprendi* from future attack is to limit its current scope. This is consistent with the majority opinion, and will prevent a painful disruption of American sentencing law.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

February, 2002

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(12)

FEB 22 2002

No. 00-10666

In The

Supreme Court of the United States

WILLIAM JOSEPH HARRIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF 25 STATES AND TERRITORIES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID SAMSON
Attorney General of New Jersey
LISA SARNOFF GOCHMAN
Deputy Attorney General
Counsel of Record
DIVISION OF CRIMINAL JUSTICE
R.J. HUGHES JUSTICE COMPLEX
P.O. BOX 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

BEST AVAILABLE COPY

BRUCE M. BOTELHO
Attorney General
State of Alaska

JANET NAPOLITANO
Attorney General
State of Arizona

KEN SALAZAR
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

JAMES E. RYAN
Attorney General
State of Illinois

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

THOMAS F. REILLY
Attorney General
Commonwealth of Massachusetts

MICHAEL C. MOORE
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

MIKE McGRATH
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

BETTY D. MONTGOMERY
Attorney General
State of Ohio

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

MARK BARNETT
Attorney General
State of South Dakota

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

JOHN CORNYN
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

WILLIAM SORRELL
Attorney General
State of Vermont

ELLIOT M. DAVIS
Solicitor General
U.S. Virgin Islands

DARRELL V. McGRAW, JR.
Attorney General
State of West Virginia

TABLE OF CONTENTS

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT

THE CONSTITUTIONAL RULE OF *McMILLAN* REMAINS GOOD LAW, AND PRINCIPLES OF *STARE DECISIS* PRECLUDE THIS COURT FROM OVERRULING ITS VALID PRECEDENT 3

A. The New "Bright Line" Rule Announced by the *Apprendi* Court Casts No Doubt on the Continued Validity of *McMillan* 5

B. The *McMillan* Rule Remains Entirely Workable 11

C. The States' Reliance on the *McMillan* Rule Demands its Reaffirmance 11

D. Sound Reasons of Policy and Practicality Favor Retention of the Historical Demarcation Between Jury and Judicial Functions 19

E. Any Modification in the *McMillan* Rule Should Be Given Prospective Application Only 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES: PAGE

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 8,11 20

Apprendi v. New Jersey, 530 U.S. 466 (2000) . . . *passim*

Arizona v. Rumsey, 467 U.S. 203 (1984) 4

Browning v. United States, 241 F.3d 1262 (10th Cir. 2001) 24

Dickerson v. United States, 530 U.S. 428 (2000) 4

Edwards v. United States, 523 U.S. 511 (1998) 22

Ex parte Guess, 507 So.2d 551 (Ala. 1987) 13

Forbes v. United States, 262 F.3d 143 (2d Cir. 2001) . 24

Gardner v. State, 344 Md. 642, 689 A.2d 610 (1997) . 14

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991) 4

In re Clemmons, 259 F.3d 489 (6th Cir. 2001) 24

In re Joshua, 224 F.3d 1281 (11th Cir. 2000) 24

In re Tatum, 233 F.3d 857 (5th Cir. 2000) 24

In re Turner, 267 F.3d 225 (3d Cir. 2001) 24

In re Winship, 397 U.S. 358 (1970) 11

Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000) 24

Jones v. United States, 526 U.S. 227 (1999) 5,16

Malloy v. State, 1 P.3d 1266 (Alaska Ct. App. 2000), *pet. hr'g granted* (Alaska 2000) 17

McGregor v. State, 789 So.2d 976 (Fla. 2001) 14,15

McMillan v. Pennsylvania, 477 U.S. 79 (1986) . . *passim*

Monge v. California, 524 U.S. 721 (1998) 20

Mullaney v. Wilbur, 421 U.S. 684 (1975) 8

Patterson v. New York, 432 U.S. 197 (1977) 25

Payne v. Tennessee, 501 U.S. 808 (1991) 4

People v. Fender, 757 N.E.2d 645 (Ill. App. 2001) 14,15

People v. Newbolds, 757 N.E.2d 664 (Ill. App.), *appeal denied*, ___ N.E.2d ___ (2001) 15

People v. Phillips, 759 N.E.2d 946 (Ill. App. 2001) 14,15

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 6,11 12

Rodgers v. United States, 229 F.3d 704 (8th Cir. 2000) 24

Shannon v. United States, 512 U.S. 573 (1994) . . . 19,21

Spencer v. Texas, 385 U.S. 554 (1967) 17

State Oil Company v. Khan, 522 U.S. 3 (1997) 4

State v. Conley, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied*, 121 S.Ct. 1383 (2001) 14,15

State v. Cox, 37 P.3d 437 (Ct.App. Ariz. 2002) . . . 13,15

State v. Johnson, 166 N.J. 523, 766 A.2d 1126 (2001) 16,23 24,25

State v. McCarty, 224 Kan. 179, 578 P.2d 274 (1978) 13

State v. Petrucci, 343 N.J. Super. 536, 779 A.2d 429 (App. Div. 2001), *petition for certif. pending*, ___ N.J. ___, ___ A.2d ___ (2002) 16

State v. Stanton, 339 N.J. Super. 1, 770 A.2d 1198 (App. Div.), *certif. granted*, 169 N.J. 609, 782 A.2d 427 (2001) 16,17

State v. Watson, 2002 WL 58914 (N.J. App. Div. January 16, 2002) 17, 23

Sustache-Rivera v. United States, 221 F.3d 8 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 1364 (2001) 24

Talbott v. Indiana, 226 F.3d 866 (7th Cir. 2000) 24

Taylor v. State, 333 Md. 229, 634 A.2d 1322 (1994) . 14

Teague v. Lane, 489 U.S. 288 (1989) 23

United States v. Gaudin, 515 U.S. 506 (1995) 4

United States v. International Business Machines Corporation, 517 U.S. 843 (1996) 4

United States v. Sanders, 247 F.3d 139 (4th Cir.), *cert. denied*, 122 S.Ct. 573 (2001) 24

United States v. Watts, 519 U.S. 148 (1997) 22

Williams v. New York, 337 U.S. 241 (1949) 6,7 8,10

STATUTES:

18 U.S.C.A. § 924(c)(1)(A)(ii) (West 2000) 3,5 11

18 U.S.C.A. § 2119 (West 2000) 5

42 U.S.C.A. § 13701(2) (West 1995 and Supp. 2001) 13

42 U.S.C. § 13704(a)(1) (West 1995 and Supp. 2001) 13

Ala. Code § 13A-5-6(a)(4) (1994) 13

Ala. Code § 13A-5-6(a)(5) (1994) 13

Alaska Stat. § 12.55.125(a)(3) (Michie 2000) 17

Alaska Stat. § 12.55.125(b) (Michie 2000) 13

Ariz.Rev.Stat. § 13-604.02(B) (2001) 13,15

Colo.Rev.Stat.Ann. § 18-1-105(9) (West 1986 and Supp. 1996) 14

Fla.Stat.Ann. § 775.082(9)(a)(1) (West 2000 and Supp. 2002) 14,15

730 Ill.Comp.Stat.Ann. 5/3-6-3(a)(2)(iii) (West 1998) 14,15

730 Ill.Comp.Stat.Ann. 5/5-5-3(c)(2)(D) (West 1998) 14,15

Kan.Stat.Ann. § 21-4618 (West 2000) 13

Kan.Stat.Ann. § 21-4635 (West 2000) 14,15

Md.Ann.Code of 1957, Art. 27, § 286 (1996 and Supp. 2001) 14

Md.Ann.Code of 1957, Art. 27, § 286D (1996 and Supp. 2001) 14

Md.Ann.Code of 1957, Art. 27, § 643B (1996 and Supp. 2001) 14

Minn.Stat.Ann, § 609.11 (West 1987 and Supp. 2002) 13

Mo.Rev.Stat. § 558.018.5 (West 2000) 14

1997 N.J. Laws c. 117, § 2, eff. June 9, 1997, amended by 2001 N.J. Laws c. 129, § 1, eff. June 29, 2001 25

1981 N.J. Laws c.31, § 1, eff. February 12, 1981 . . . 18

N.J.Stat.Ann. § 2C:11-5b(1) (West 1995 and Supp. 2002) 16,17

N.J.Stat.Ann. § 2C:43-6c (West 1995) 13,17 18,23

N.J.Stat.Ann. § 2C:43-6d (West 1995) 13,18 23

N.J.Stat.Ann. § 2C:43-6g (West 1995) 16

N.J.Stat.Ann. § 2C:43-7.2 (West 1995 and Supp. 2002) 16,23 25

N.J.Stat.Ann. § 2C:43-7.2a (West 1995 and Supp. 2002) 24

N.J.Stat.Ann. § 2C:43-7.2c (West 1995 and Supp. 2002) 24

N.J.Stat.Ann. § 2C:44-3e (West 1995) 8

N.J.Stat.Ann. § 2C:44-6a (West 1995 and Supp. 2001) 21

18 Pa.Const.Stat. § 6314(a) (West 2000) 14

18 Pa.Const.Stat. § 6314(b) (West 2000) 14

18 Pa.Const.Stat. § 6317(b) (West 2000) 14

18 Pa.Const.Stat. § 7508(a) (West 2000) 14

42 Pa.Const.Stat. § 9712 (West 1982) 7

42 Pa.Const.Stat. § 9712(a) (West 1998) 13

42 Pa.Const.Stat. § 9712(b) (West 1998) 13

42 Pa.Const.Stat. § 9713(a) (West 1998) 14

42 Pa.Const.Stat. § 9717(a) (West 1998) 14

42 Pa.Const.Stat. § 9718(a) (West 1998) 14

42 Pa.Const.Stat. § 9719(a) (West 1998) 14

75 Pa.Const.Stat. § 3742(b) (West 1996) 14-15

2001 V.I. Sess.Laws 6493 13

RULE:

N.J. Court Rule 3:21-2(a) 21

OTHER SOURCES CITED:

Paula M. Ditton & Doris James Wilson, U.S. Department of Justice, *Truth in Sentencing in State Prisons* (1999, NCJ 170032) 12

Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St.Louis U.L.J. 425 (2000) 18

Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vanderbilt L. Rev. 1467 (2001) 13

Wayne R. LaFave, Jerold H. Israel & Nancy J. King, 5 Criminal Procedure § 26.3(c) (2d ed. 1999) 12

Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775 (1999) 19

Monograph, U.S. Department of Justice, *1996 National Survey of State Sentencing Structures* (1998, NCJ 169270) 12

Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The Apprendi Debate*, Federal Sentencing Reporter, Vol. 12, No. 4 (January/February 2000) 20,21

Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L.J. 1355 (1999) 21

STATEMENT OF *AMICI* INTEREST

Amicus curiae State of New Jersey, together with 24 other States and Territories, writes in support of respondent to affirm the judgment below. At issue is the continued vitality of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which for 16 years has stood for the rule that the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment permit state legislatures to require courts to impose a mandatory term of imprisonment, within a prescribed statutory range, when the judge finds a particular aggravating fact to exist under an evidentiary standard less than "beyond a reasonable doubt." Petitioner seeks to abolish the *McMillan* rule by requiring a jury finding beyond a reasonable doubt on the existence of the legislatively-defined aggravating circumstance.

The doctrine of *stare decisis* precludes reversal of *McMillan*. Many States, including New Jersey, have implemented mandatory minimum statutes in their respective criminal codes, and will be immediately affected by any modification or wholesale retraction of the *McMillan* rule. Those States that at present do not utilize such statutes will nonetheless feel the impact of any revision to this long-standing rule if, at some future date, changing penological demands call for mandatory minimum sentencing schemes.

The States' reliance on a viable and workable constitutional rule, and the enormous burden that the States will be forced to bear if this rule is suddenly invalidated, call for the reaffirmance of *McMillan*. For these reasons and those elaborated below, we submit this *amici curiae* brief for the Court's consideration.

SUMMARY OF ARGUMENT

For sixteen years, *McMillan* has enabled state legislatures to deal with dangerous criminals by enacting statutes requiring the imposition of mandatory minimum terms of imprisonment, within the statutory range for the offense, when the sentencing judge finds the existence of a prescribed "sentencing factor" under an evidentiary standard lower than "beyond a reasonable doubt." Principles of *stare decisis* operate against nullifying the *McMillan* rule. *McMillan* is still good law that need not and should not be overruled.

First, nothing in the Court's more recent jurisprudence invalidates *McMillan*. Petitioner's attempt to superimpose the "bright line" rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact, other than recidivism, which increases a sentence beyond the statutory maximum must be presented to a jury, onto mandatory minimum sentencing statutes, is defeated by the *Apprendi* Court's firm pronouncement that "sentencing enhancers" are fundamentally different from "sentencing factors."

Second, the multi-prong *McMillan* test remains entirely workable. It was last utilized by this Court less than two years ago in *Apprendi*. Petitioner himself analyzes the federal statute at issue using the *McMillan* test.

Third, many state legislatures have relied upon the *McMillan* "sentencing factor" rule since the case was decided. Countless state prisoners will be subject to early release if *McMillan* is overruled. Ironically, these prisoners are precisely the ones that legislatures, in enacting mandatory minimum terms, have deemed most deserving of parole ineligibility terms.

Fourth, policy and practicality dictate retention of the *McMillan* rule. Shifting sentencing responsibility away from the judge will increase the likelihood that juries will acquit a

defendant of the criminal charges, rather than impose a stiff mandatory minimum. It will prejudice criminal defendants by requiring them to pursue mutually-exclusive strategies as they seek to maintain their innocence while at the same time seek to mitigate their punishment. It will drive up the cost of jury trials which were once unitary but may now need to be bifurcated. And it will impose an undue burden on jurors who must put aside other responsibilities to sit through a second phase of trial, often weeks after the guilt phase ended.

Finally, if this Court is inclined to overrule *McMillan*, any new rule must be given prospective application only, in order to forestall the flood of petitions for collateral relief that will inevitably ensue.

In the end, there is no sound justification for invalidating the *McMillan* rule. The *amici* States and Territories urge its reaffirmance.

ARGUMENT

THE CONSTITUTIONAL RULE OF *McMILLAN* REMAINS GOOD LAW, AND PRINCIPLES OF *STARE DECISIS* PRECLUDE THIS COURT FROM OVERRULING ITS VALID PRECEDENT.

Petitioner sets forth alternative arguments for vacating his mandatory minimum term of seven years imposed pursuant to 18 U.S.C.A. § 924(c)(1)(A)(ii) (West 2000), following the sentencing court's finding that petitioner "brandished" a firearm during the course of his drug trafficking crime. His fallback position is to ask this Court to overrule the 1986 decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which endorsed mandatory minimum sentences imposed when a judge finds the presence of an aggravating sentencing factor prescribed by the legislature. Petitioner claims the holding of *McMillan* is no longer viable in light of the more recent rule of *Apprendi* 530 U.S. 466 (2000), that any fact, other than

recidivism, which increases a sentence beyond the statutory maximum must be presented to a jury. *McMillan* is still good law, however, and principles of *stare decisis* preclude this Court from abrogating its precedential value.

The Court traditionally approaches reconsideration of its own decisions "with utmost caution." *State Oil Company v. Khan*, 522 U.S. 3, 20 (1997). Whether or not this Court would today agree with the precept of *McMillan*, "the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). The policy of *stare decisis* favors adherence to precedent and "promotes stability, predictability, and respect for judicial authority." *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991); *accord United States v. International Business Machines Corporation*, 517 U.S. 843, 856 (1996). "[E]ven in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). Petitioner fails to offer the requisite "special justification"to abandon the long-standing precedent of *McMillan*, because the *Apprendi* rule does not at all weaken the validity of this decision. *See United States v. Gaudin*, 515 U.S. 506, 521 (1995).

From the time it was decided in 1986, *McMillan* has permitted state legislatures to enact statutes requiring sentencing courts to impose mandatory minimum terms upon finding specific aggravating sentencing factors under an evidentiary standard less than "beyond a reasonable doubt." The *Apprendi* majority acknowledged "the likelihood that legislative decisions may have been made in reliance on *McMillan*," and saved "for another day the question whether *stare decisis* considerations preclude reconsideration of its narrower holding." *Apprendi*, 530 U.S. at 486 n.13. If that

day has arrived, this Court should reaffirm *McMillan*, because it is still good law.

A. The New "Bright Line" Rule Announced by the *Apprendi* Court Casts No Doubt on the Continued Validity of *McMillan*.

Relying on *Jones v. United States*, 526 U.S. 227, 239 (1999), petitioner's primary argument in support of reversal of the Fourth Circuit opinion below is one of statutory construction. (Pet. Brief at 8-26). Petitioner contends, when read correctly, the text of § 924(c)(1)(A)(ii) makes "brandishing" an element of the predicate crime of violence or drug trafficking to be determined by a jury under the "beyond a reasonable doubt" standard, and not a separate sentencing factor which, when found by the judge, triggers the imposition of a mandatory minimum term of seven years.

Jones examined the enhanced penalties available under the grading sections of the federal carjacking statute, 18 U.S.C.A. § 2119 (West 2000), if the offense resulted in serious bodily injury or death. Employing a textual analysis, the Court construed § 2119 as establishing three separate offenses by the specification of distinct elements. *Jones*, 526 U.S. at 262. In the case presently before this Court, petitioner claims that the structure of the brandishing statute, § 924(c)(1)(A)(ii), is "indistinguishable from that in *Jones*," and requires a similar outcome based on principles of statutory construction. (Pet. brief at 6).

Alternatively, petitioner contends, the United States Constitution requires that a finding of brandishing a firearm in the furtherance of any crime of violence or drug trafficking under § 924(c)(1)(A)(ii) must be treated as an element of the offense. To reach this latter option, petitioner asks this Court to take the drastic step of overruling *McMillan* by extending the narrow holding of *Apprendi* to all mandatory minimum term statutes. (Pet. Brief at 27-45). The development of

related principles of law, including the *Apprendi* rule, however, has not rendered the *McMillan* rule obsolete. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992).

Over one-half century ago, the Court found that the United States Constitution was not offended when the New York State Legislature conferred broad discretionary powers on sentencing courts in fixing individualized punishments for convicted offenders. *Williams v. New York*, 337 U.S. 241, 249-52 (1949). Examining the historical basis for different evidentiary rules governing trial and sentencing procedures, the *Williams* Court noted that sentencing courts have for centuries possessed considerable discretion in setting appropriate terms of incarceration within prescribed statutory ranges:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Williams, 337 U.S. at 246.

"Sound practical reasons" further justified different evidentiary rules governing trial and sentencing procedures. *Ibid.* The guilt phase of a criminal trial deals with evidence "that is strictly relevant to the particular offense charged." *Id.* at 247. Consequently, evidence related to sentencing

should be excluded at the guilt phase, so as not to improperly influence the trier of fact. *Ibid.* The sentencing court, in contrast, "is not confined to the narrow issue of guilt" but is concerned solely with the appropriate type and length of punishment after the question of guilt has been determined. *Ibid.*

Almost forty years after *Williams*, the *McMillan* Court concluded that it was constitutional for state legislatures to designate which aggravating factors found by the sentencing court required the imposition of mandatory parole ineligibility periods. The result in *McMillan* depended in part on the Court's appreciation of and adherence to *Williams*. Citing to *Williams*, the *McMillan* court noted, "Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91.

At issue in *McMillan* was a provision of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa.Const.Stat. § 9712 (West 1982), authorizing judges to sentence anyone convicted of certain enumerated felonies to no less than five years imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. *McMillan*, 477 U.S. at 80-82. Rebuffing the petitioners' contention that visible possession of a firearm was an element of the offense that had to be proven beyond a reasonable doubt, the Court noted that the legislature's definition of the elements of the offense is usually dispositive in distinguishing between essential elements of an offense and mere sentencing factors. *Id.* at 85.

The *McMillan* Court scrutinized the Pennsylvania statute using multiple criteria to determine the constitutionality of imposing a mandatory minimum sentence based on a finding of a fact not proven beyond a reasonable doubt. *Id.* at 87-88. The Court found that the Act created no presumptions of

guilt, nor did it relieve the prosecution of its burden of proving guilt and only became applicable after a defendant was duly convicted of the crime for which he is to be punished. *Id.* at 87. A defendant sentenced pursuant to the Act did not face "'a differential in sentencing ranging from a nominal fine to a mandatory life sentence.'" *Ibid.* (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 700 (1975)). The statute did not alter the maximum penalty for the crime committed but operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. *McMillan*, 477 U.S. at 87-88. Nor was a separate offense calling for a separate penalty created. *Id.* at 88.

Finally, the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Ibid.*; *see also Almendarez-Torres v. United States*, 523 U.S. 224, 242-43 (1998). The Pennsylvania Legislature "did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment -- the instrumentality used in committing a violent felony -- and dictated the precise weight to be given that factor if the instrumentality is a firearm." *McMillan*, 477 U.S. at 89-90. All that *McMillan* added to the *Williams* doctrine was to allow legislatures to limit the sentencing court's discretion by specifying those aggravating factors which require the imposition of a minimum penalty within a statutorily-prescribed range.

A very different type of sentencing statute was challenged in *Apprendi*. New Jersey's Hate Crime Statute, N.J.Stat.Ann. § 2C:44-3e (West 1995), at the time required the sentencing judge to *extend* a defendant's maximum term of imprisonment for the predicate offense if the judge determined, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of

race, color, gender, handicap, religion, sexual orientation or ethnicity." *Apprendi*, 530 U.S. at 468-49. This statutory scheme was found unconstitutional, because it deprived the petitioner of a jury finding beyond a reasonable doubt of facts which exposed him to a penalty greater than the statutory maximum for the offense charged in the indictment. *Id.* at 490. The *Apprendi* Court articulated this "bright line" rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Ibid.*

The *Apprendi* Court expressly restricted the reach of its new rule by drawing a crucial distinction between a "sentencing enhancement," which requires a jury finding beyond a reasonable doubt, and a "sentencing factor" which does not:

> The term [sentencing factor] appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Apprendi, 530 U.S. at 494 n.19 (emphasis in original). The Court expressly declined to apply this new "bright line" rule to mandatory minimum sentencing terms. *Apprendi*, 530 U.S. at 487 n.13.

Tracing the development of criminal sentencing in this country, the *Apprendi* Court made perfectly clear "that nothing in this history suggests that it is impermissible for judges to exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment *within the range* prescribed by statute." *Apprendi*, 530 U.S. at 481 (emphasis in original). *Williams* was specifically cited twice in support of this proposition. *Id.* at 481, 482. The *Apprendi* decision gives no hint, let alone declares, that *McMillan*, which recognized that a sentencing judge's discretion could be reined in by the legislature, is constitutionally unsound. To the contrary, the *Apprendi* majority noted that its reasoning did not conflict with *McMillan's* narrow holding, because the statute in *McMillan* did not increase the overall maximum term. *Apprendi*, 530 U.S. at 495.

The *Apprendi* decision does not change or erode the fundamental principal of *McMillan*. In fact, *Apprendi* upholds and respects its validity. *Apprendi* stands for nothing more than what it plainly says: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The *Apprendi* majority expressly declined to extend this very narrow holding to mandatory minimum sentencing terms, explaining in no uncertain terms, "We do not overrule *McMillan*." *Apprendi*, 530 U.S. at 487 n.13.

The rule of *McMillan* is not an "abandoned doctrine," *Casey*, 505 U.S. at 855, that can, or should, be abrogated.[1]

B. The *McMillan* Rule Remains Entirely Workable.

Certainly, the multi-faceted test formulated in *McMillan* has not proven "unworkable." *See Casey*, 505 U.S. at 855. The *Apprendi* court in fact used it to show why New Jersey's Hate Crime sentencing enhancement statute, which increased the petitioner's sentence beyond the prescribed statutory range for the predicate offense, did *not* pass constitutional muster under *McMillan*. *Apprendi*, 503 U.S. at 495-96. The *McMillan* test was also employed by the Court two years earlier to find that the Constitution permits a legislature to authorize the judge to impose an enhanced sentence based on the traditional sentencing factor of recidivisim. *Almendarez-Torres*, 523 U.S. at 242-24. And, most telling of all, in arguing that Congress restructured existing crimes in order to evade the commands of *In re Winship*, 397 U.S. 358 (1970), thereby relieving the prosecution of its burden of proving guilt, petitioner himself subjects § 924(c)(1)(A) to the *McMillan* test. (Pet. Brief at 45-47).

C. The States' Reliance on the *McMillan* Rule Demands its Reaffirmance.

The *McMillan* rule "is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation,"

---

[1] That *McMillan* was decided by a narrow 5-4 split ought not undermine its authority. It has continued to be good law for the past sixteen years. *Apprendi*, 530 U.S. at 487 n.13. And, to the extent that the narrow 5-4 majority in *McMillan* gives any indication that its precedential value rests on shaky ground, it should not be overruled by the recent *Apprendi* decision, which itself was decided by a slim 5-4 majority only two terms ago.

Casey, 505 U.S. at 854, because many states have reasonably relied on *McMillan*'s continued application. *See id.* at 855. The consequences of abrogating long-standing precedent guiding state legislatures "will likely be severe." *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting). If this Court holds that every fact relevant to the determination of a mandatory minimum sentence must be decided by a jury, by proof beyond a reasonable doubt, "its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades." *Id.* at 549.

Mandatory minimum sentencing laws are the product of a movement towards determinate sentencing that decreases disparate punishment. They are "designed to control the discretion of judges and parole boards and advance the goals of deterrence and incapacitation." Wayne R. LaFave, Jerold H. Israel & Nancy J. King, 5 Criminal Procedure, at 735 § 26.3(c) (2d ed. 1999). By February 1996, all 50 states and the District of Columbia employed some version of mandatory minimum sentencing laws where the triggering factor is found either by the judge or the jury. Most of these laws target habitual offenders and the crimes of possessing a deadly weapon, driving under the influence of alcohol, and possessing and/or distributing drugs. Monograph, U.S. Department of Justice, *1996 National Survey of State Sentencing Structures* (1998, NCJ 169270), Exhibits 1-1, 1-4. "Truth in sentencing" laws requiring violent offenders to serve 50% to 100% of the maximum sentence imposed prior to release have also become common throughout the United States. By 1999, 42 states had adopted such laws. Paula M. Ditton & Doris James Wilson, U.S. Department of Justice,

Truth in Sentencing in State Prisons (1999, NCJ 170032), Table 1.[2]

At least five states and one territory authorize the judge to impose mandatory minimum terms following a judicial finding, by a preponderance of the evidence, that the defendant possessed a firearm. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vanderbilt L.Rev. 1467, 1492 (2001); *see, e.g.*, Alabama: Ala. Code § 13A-5-6(a)(4), (5) (1994); *Ex parte Guess*, 507 So.2d 551 (Ala. 1987); Kansas: Kan.Stat.Ann. § 21-4618 (West 2000) (applies to crimes committed prior to July 1, 1993); *State v. McCarty*, 224 Kan. 179, 578 P.2d 274 (1978); Minnesota: Minn.Stat.Ann. § 609.11 (West 1987 and Supp. 2002); New Jersey: N.J.Stat.Ann. § 2C:43-6c, d (West 1995); Pennsylvania: 42 Pa.Const.Stat. § 9712(a), (b) (West 1998); *McMillan*, 477 U.S. at 81-82; United States Virgin Islands: Virgin Islands Gun Control Act of 2001, 2001 V.I. Sess.Laws 6493.

Other examples of mandatory minimum sentencing statutes where the triggering factor is found by the judge and is not necessarily encompassed in a jury verdict are in effect in Alaska [Alaska Stat. § 12.55.125(b) (Michie 2000) (relationship of child-murder victim to defendant)]; Arizona [Ariz.Rev.Stat. § 13-604.02(B) (2001) (release status); *State v. Cox*, 37 P.3d 437 (Ct.App. Ariz. 2002)], Colorado

---

[2] States that enact sentencing laws requiring that all persons convicted of "part 1 violent crimes" serve not less than 85% of the sentence imposed (without counting time not actually served, such as administrative or statutory incentives for good behavior) are eligible for federal grant awards under the Violent Offender Incarceration and Truth-in-Sentencing programs (VOITIS). 42 U.S.C. § 13704(a)(1) (West 1995 and Supp. 2001) ("Truth-in-sentencing incentive grants"). "Part 1 violent crimes" are defined as "murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault, as reported to the Federal Bureau of Investigation for purposes of the Uniform Crime Reports." 42 U.S.C. § 13701(2) (West 1995 and Supp. 2001) ("Definitions").

[Colo.Rev.Stat.Ann. § 18-1-105(9) (West 1986 and Supp. 1996) ("extraordinary aggravating circumstances")], Florida [Fla.Stat.Ann. § 775.082(9)(a)(1) (West 2000 and Supp. 2002) (Prison Releasee Reoffender Act); *McGregor v. State*, 789 So.2d 976 (Fla. 2001)], Illinois [730 Ill.Comp.Stat.Ann. 5/5-5-3(c)(2)(D) (West 1998) (quantity of drugs); *People v. Phillips*, 759 N.E.2d 946 (Ill. App. 2001); 730 Ill.Comp.Stat.Ann. 5/3-6-3(a)(2)(iii) (West 1998) (victim suffered great bodily harm); *People v. Fender*, 757 N.E.2d 645 (Ill. App. 2001)], Kansas [Kan.Stat.Ann. § 21-4635 (West 2000) ("hard 40" for first degree murder); *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied*, 121 S.Ct.1383 (2001)], Maryland [Md.Ann.Code of 1957, Art. 27, § 286 (1996 and Supp. 2001) (repeat drug offender); *Gardner v. State*, 344 Md. 642, 689 A.2d 610 (1997); Md.Ann.Code of 1957, Art. 27, § 286D (1996 and Supp. 2001) (repeat drug offender in school zone); Md.Ann.Code of 1957, Art. 27, § 643B (1996 and Supp. 2001) (second conviction of crime of violence); *Taylor v. State*, 333 Md. 229, 634 A.2d 1322 (1994)], Missouri [Mo.Rev.Stat. § 558.018.5 (West 2000) (predatory sexual offender)] and Pennsylvania [18 Pa.Const.Stat. § 6314(a) (West 2000) (delivery of controlled substance to a minor); 18 Pa.Const.Stat. § 6314(b) (West 2000) (four specified circumstances present during delivery of controlled substance); 18 Pa.Const.Stat. § 6317(b) (West 2000) (delivery of controlled substance within specified distance of school property, playground or on a school bus); 18 Pa.Const.Stat. § 7508(a) (West 2000) (nature and quality of controlled substance delivered or intended for delivery); 42 Pa.Const.Stat. § 9713(a) (West 1998) (specified offense committed in or near public transportation); 42 Pa.Const.Stat. § 9717(a) (West 1998) (victim is over 60 years of age and not a police officer); 42 Pa.Const.Stat. § 9718(a) (West 1998) (victim is either under 16 years of age or 13 years of age); 42 Pa.Const.Stat. § 9719(a) (West 1998) (offense committed by person impersonating a law enforcement officer); 75

Pa.Const.Stat. § 3742(b) (West 1996) (leaving scene of accident involving serious bodily injury or death)].

Appellate courts in several states have taken the *Apprendi* Court at its word when it advised, 530 U.S. at 487 n.13, "We do not overrule *McMillan*." These courts have expressly found their respective mandatory minimum sentencing statutes constitutional under *Apprendi*. *See McGregor v. State*, 789 So.2d at 977-78 (Supreme Court of Florida upheld Fla.Stat.Ann. § 775.082(9)(a)(1), requiring the imposition of a mandatory minimum equal to 100% of maximum term imposed when the sentencing court finds the defendant committed or attempted to commit any of the enumerated crimes within three years of being released from a state correctional facility); *State v. Conley*, 270 Kan. at 30-35, 11 P.3d at 1157-1160 (Supreme Court of Kansas upheld "hard 40" mandatory minimum sentence, Kan.Stat.Ann. § 21-4635, imposed when the sentencing court finds, under the "preponderance of the evidence" standard, certain aggravating factors warranting an increase of the parole ineligibility period for first-degree premeditated murder from 25 to 40 years); *State v. Cox*, 37 P.3d at ___ (Court of Appeals of Arizona upheld Ariz.Rev.Stat. § 13-604.02(B), which permits the sentencing court to increase the mandatory minimum term based on a finding by clear and convincing evidence of the defendant's release status); *People v. Phillips*, 759 N.E.2d at 949-50 (Court of Appeals of Illinois upheld 730 Ill.Comp.Stat.Ann. 5/5-5-3(c)(2)(D), authorizing sentencing courts to impose a four-year mandatory minimum sentence upon finding that the quantity of cocaine in the defendant's possession with intent to deliver was in excess of five grams); *People v. Newbolds*, 757 N.E.2d 664, 665-66 (Ill. App.) (Court of Appeals of Illinois upheld 730 Ill.Comp.Stat.Ann. 5/3-6-3(a)(2)(iii), requiring a defendant to serve 85% of his term of imprisonment when sentencing court makes a finding that the victim suffered great bodily harm), *appeal denied*, ___ N.E.2d ___ (2001); *People v. Fender*, 757 N.E.2d at 652-54 (same). "These states should

not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence must now be treated as offense elements for determination by the jury." *Jones*, 526 U.S. at 271 (Kennedy, J., dissenting).

Several of New Jersey's mandatory minimum sentences have likewise been challenged under *Apprendi*. Unlike other state courts, however, the New Jersey judiciary has acted in anticipation that *McMillan* may be overruled. In *State v. Johnson*, 166 N.J. 523, 547, 766 A.2d 1126, 1140 (2001), the Supreme Court of New Jersey construed the 1997 "No Early Release Act" (NERA), N.J.Stat.Ann. § 2C:43-7.2 (West 1995 and Supp. 2002), to require a jury finding beyond a reasonable doubt that the defendant committed a "violent" crime before a mandatory parole ineligibility period equal to 85% of the maximum term could be imposed. Acknowledging, as it had to, that the *Apprendi* decision specifically declined to overrule *McMillan*, the Supreme Court of New Jersey applied the state's "constitutional doubt" doctrine and interpreted the text of NERA so as to avoid the constitutional question. *Johnson*, 166 N.J. at 540-41, 543-44, 766 A.2d at 1136, 1138.

Consistent with the statutory analysis employed in *Johnson*, the Superior Court of New Jersey, Appellate Division, has interpreted two different mandatory minimum sentencing statutes to require jury findings beyond a reasonable doubt of the predicate fact triggering mandatory minimum sentencing. *State v. Petrucci*, 343 N.J. Super. 536, 779 A.2d 429 (App. Div. 2001) (under assault firearms statute, N.J.Stat.Ann. § 2C:43-6g (West 1995), jury must determine whether a particular firearm is "substantially identical" to an enumerated firearm or type of firearm), *petition for certif. pending*; __, N.J. __, __ A.2d __ (2002); *State v. Stanton*, 339 N.J. Super. 1, 770 A.2d 1198 (App. Div.) (under vehicular homicide statute, N.J.Stat.Ann. § 2C:11-5b(1) (West 1995 and Supp. 2001), jury must determine whether the defendant was driving under the

influence of alcohol or drugs at the time of the offense), *certif. granted*, 169 N.J. 609, 782 A.2d 427 (2001).[3] In a third case, *State v. Watson*, 2002 WL58914, at *8 (N.J. App. Div. January 16, 2002), the appellate court sidestepped the constitutional issue, but advised trial judges in future cases to submit to the jury the question whether under the firearm possession statute, N.J.Stat.Ann. § 2C:43-6c, the defendant used or possessed a firearm. *Cf. Malloy v. State*, 1 P.3d 1266, 1280-88 (Alaska Ct. App. 2000) (appellate court held that Alaska Stat. § 12.55.125(a)(3) (Michie 2000), which increases the mandatory minimum term for first degree murder from 20 to 99 years and restricts the defendant's eligibility for discretionary parole when "the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture," denied defendant her rights to due process, jury trial and grand jury indictment under the Alaska State Constitution), *pet. hr'g granted* (Alaska 2000). There is, therefore, much at stake in New Jersey, as well as every other state with mandatory minimum sentencing statutes.

That not all jurisdictions have designated the sentencing judge as the finder of facts triggering mandatory minimums does not lessen the enormous impact of overruling *McMillan*. "[T]he fact that the States have formulated different statutory schemes to punish [criminals] is merely a reflection of our federal system, which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement.'" *McMillan*, 477 U.S. at 90 (quoting *Spencer v. Texas*, 385 U.S. 554, 566 (1967)). Legislatures that have chosen particular models of sentencing for dealing with their prison populations should be free to modify or abandon them

---

[3] The Supreme Court of New Jersey during oral argument in *State v. Stanton* on January 3, 2002, indicated its intention to await this Court's decision in *Harris* before assessing the constitutionality of the mandatory minimum sentencing provision in the vehicular homicide statute, N.J.Stat.Ann. § 2C:11-5b(1), under *McMillan*.

when they no longer fit the penological needs of their state. *See* Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St.Louis U.L.J. 425, 427 (2000) (noting that two states, Louisiana and Wisconsin, repealed their respective sentencing guidelines). States that at the moment do not entrust the imposition of mandatory minimums to the judiciary may find in the future that vesting sentencing judges with this responsibility better suits their demands for sentencing reform. Overruling *McMillan* will thus affect every state, not only those which presently authorize judges to impose mandatory minimum sentences when specified aggravating circumstances are found.

The *Apprendi* decision has generated a tidal wave of litigation: as of February 2002, Westmate™ lists close to 2,700 state and federal cases citing to *Apprendi*. There is no reason to believe that overruling *McMillan* will have any less impact on state courts. Indeed, the predictable fallout from reversal of *McMillan* cannot be overstated. It will create an avalanche of post-conviction applications in the state courts, as well as habeas corpus petitions in the federal courts, by state prisoners sentenced under laws which at the time were deemed constitutional. New Jersey's Graves Act, N.J.Stat.Ann. § 2C:43-6c, for example, requires the sentencing court to fix a mandatory term of one-third to one-half the maximum sentence imposed for the underlying offense if the judge finds, by a preponderance of the evidence, the person was in possession of a firearm "while in the course of committing or attempting to commit the crime, including the immediate flight therefrom ...." N.J.Stat.Ann. § 2C:43-6d. This law was enacted in 1981. 1981 N.J. Laws c.31, § 1, eff. February 12, 1981. More than twenty years have since passed, and thousands of New Jersey state prisoners will inundate the state and federal court dockets demanding early release if *McMillan* is overruled. All of these prisoners possessed a firearm while committing their

crimes, making them among the state's most violent offenders.[4]

D. Sound Reasons of Policy and Practicality Favor Retention of the Historical Demarcation Between Jury and Judicial Functions.

"The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury." *Shannon v. United States*, 512 U.S. 573, 579 (1994). Blurring this dividing line comes at great practical and monetary cost to the criminal justice system.

In the unitary trial format, an increase in jury nullification is a natural consequence of informing jurors of mandatory penalties in the course of the trial. "[T]here is evidence" that jurors who are aware of mandatory minimum terms "choose to nullify rather than condemn a guilty defendant to such a severe sentence." Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, 1784 (1999). The breakdown of the separate functions traditionally delegated to judges and juries thus puts the prosecution at a distinct disadvantage: even when the state is able to prove a sentencing factor beyond a reasonable doubt, the jury, unlike the judge, has the power to disregard the law and acquit, without any recourse for the prosecution under double jeopardy principles. This will also complicate jury selection, because potential jurors who are unable or unwilling to

---

[4] We have been informed by Stanley Repko, Director, Office of Policy and Planning, New Jersey Department of Corrections, as of January 2002, of the 27,400 inmates housed in New Jersey state prisons, 16,714 (approximately 60%) were serving fixed periods of parole ineligiblity. This figure, however, does not distinguish between mandatory and discretionary parole disqualifiers.

consider guilt separately from punishment must be weeded out.

Reallocating sentencing decisions to the jury will surely clog the trial court system in states with mandatory minimum sentencing statutes. Even defendants who plead guilty to the substantive offense could demand that a jury make the determination whether a mandatory minimum sentencing factor applies. And, when the accused believes that the prosecution cannot meet its burden of proving a particular triggering factor beyond a reasonable doubt, he has a strong incentive to reject any plea offer that includes a mandatory minimum sentence and instead take his chances at a jury trial.

"There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury." *Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting). Indictments and jury instructions will become more cumbersome than they are now. Asking a jury to consider "every conceivable wrinkle" will become "unworkable and seriously compromise the certainty of punishment and its deterrent effect." *Ibid.* (quoting United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987), Part A, at 1.2).

Criminal defendants, too, will bear substantial setbacks, as they try to avoid conviction by maintaining their innocense, while they simultaneously attempt to mitigate their sentence if convicted. *Almendarez-Torres*, 523 U.S. at 235; *Monge v. California*, 524 U.S. 721, 729 (1998). Often, the strategies of seeking an outright acquittal and seeking a lenient sentence are at complete odds with each other. "Requiring defendants to confront aggravating factors at trial burdens their right not to testify and not to present evidence. At the same time, the rules of evidence tie their hands in presenting mitigating evidence." Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors*

into Offense Elements: The Apprendi Debate, Federal Sentencing Reporter, Vol. 12, No. 4 (January/February 2000). It will be difficult, if not impossible, at such trials to craft comprehensible instructions completely eradicating the prejudice to the accused when evidence is admitted on the issue of punishment but cannot be considered by the jury on the issue of guilt. *Cf. Shannon*, 512 U.S. at 579 ("providing jurors sentencing information ... creates a strong possibility of confusion.").

Bifurcated trials in which the jury first considers guilt and then considers punishment in separate proceedings will inevitably follow when the sentencing factor is not an essential element of the predicate offense, but this is an ineffective solution. "Bifurcating fact-finding at trial will not resolve the inherent tension between strategies aimed at securing acquittal and those that tacitly acknowledge some guilt in the hope of mitigating punishment." Ross, *supra* at ___.

Bifurcation is also costly and impractical. The finder of fact at sentencing hearings must have reliable evidence of aggravating and mitigating sentencing factors. Jurors who sat at the guilt phase thus may have to be recalled weeks or months later when the presentence or probation investigation is finally completed. Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L.J. 1355, 1377 (1999) (book review); *see, e.g.*, N.J.Stat.Ann. § 2C:44-6a (West 1995 and Supp. 2001) ("The court shall not impose sentence without first ordering a presentence investigation of the defendant and according due consideration to a written report of such investigation when required by the Rules of Court."); N.J. Court Rule 3:21-2(a) ("Before the imposition of a sentence or the granting of probation court support staff shall make a presentence investigation in accordance with [N.J.Stat.Ann.] § 44-6 and shall report to the court. The report shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant and the

prosecutor."). This puts an undue hardship on jurors who have already fulfilled their civic duty, yet once again must set aside their obligations to their families and jobs to assume what historically has been strictly a judicial function. Impaneling an entirely new group of jurors at the sentencing phase eliminates the strategic problems involved in recalling guilt-phase jurors, but it, too, is a time-consuming and costly measure.

There also exists the very real risk that the public will be endangered by requiring all mandatory minimum terms be found by a jury beyond a reasonable doubt. As noted above, juries reluctant to impose a mandatory term may opt instead for acquittal. In other cases where the prosecution is unable to meet the high burden of proof beyond a reasonable doubt, but can meet a lower evidentiary standard, mandatory minimum terms cannot be imposed. The result is that the most threatening criminals whom state legislatures have designated as least deserving of early parole (such as those in possession of a firearm during the commission of the offense) will, under a reallocation of sentencing facts, be more likely to be sentenced without the mandatory parole ineligibility periods that keep them in prison and safely away from the general public.[5]

E. Any Modification in the *McMillan* Rule Should Be Given Prospective Application Only.

Should this Court choose to extend *Apprendi* to require that the triggering factor for mandatory minimum terms must be found by a jury beyond a reasonable doubt, the *amici*

---

[5] Requiring sentencing facts to be found under the "beyond a reasonable doubt" standard also conflicts with the Court's precedent that sentencing courts may consider uncharged or acquitted conduct in fixing appropriate sentences within statutory guidelines. *Edwards v. United States*, 523 U.S. 511 (1998); *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

States and Territories strongly urge this Court to make plain that this rule, which would place a new obligation on the states and federal government, is prospective only. *See Teague v. Lane*, 489 U.S. 288, 301 (1989). Retroactive application will lead to an administrative crisis for the state court systems which will be overrun with petitions for collateral relief.

The courts of New Jersey realize the overwhelming burden the state will bear if a similar rule is applied retroactively. In *Johnson*, 166 N.J. at 547, 766 A.2d at 1140, the Supreme Court of New Jersey construed the 1997 "No Early Release Act" (NERA), N.J.Stat.Ann. § 2C:43-7.2, to require a jury finding beyond a reasonable doubt that the defendant committed a "violent" crime before a parole ineligibility period equal to 85% of the maximum term could be imposed. Until *Johnson*, the sentencing courts had made that finding under a lesser evidentiary standard. Noting that "[r]etroactive application of today's ruling could result in post-conviction petitions from a large number of inmates currently serving NERA sentences[,]" the Supreme Court of New Jersey deliberately made its ruling prospective only. *Johnson*, 166 N.J. at 547, 766 A.2d at 1140. Similarly, in *Watson*, 2002 WL58914, at *8, the Superior Court of New Jersey, Appellate Division, stopped short of striking down the firearms possession statute, N.J.Stat.Ann. § 2C:43-6c, d, as unconstitutional, but urged trial judges *in future cases* to submit special verdicts to the jury in Graves Act cases where the use or possession of a firearm is not an element of the predicate offense. The state courts are rightfully worried about the application of a new rule based on an extension of *Apprendi* "when such an application would undermine the

validity of a large number of convictions." *Johnson,* 166 N.J. at 547, 766 A.2d at 1140.[6]

This Court should note that the states' legislative reaction to overruling *McMillan* will likely be similar to the New Jersey Legislature's response to the *Johnson* decision by the Supreme Court of New Jersey. NERA, as originally enacted, imposed a mandatory minimum prison term of 85% of the overall sentence for any first- or second degree conviction found by the sentencing judge to be a "violent crime." N.J.Stat.Ann. § 2C:43-7.2a, c. NERA defined "violent crime" as

> [a]ny crime in which the actor causes death, causes serious bodily injury as defined in subsection b. of N.J.S. 11-1, or uses or threatens the immediate use of a deadly weapon. "Violent crime" also includes any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force.

Thus, for example, under the original NERA statute, a person armed with a firearm during the course of a robbery would

---

[6] Federal circuit courts of appeal in every circuit have refused to apply *Apprendi* retroactively, and no conflict exists on this issue: *See Sustache-Rivera v. United States*, 221 F.3d 8, 14-15 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 1364 (2001); *Forbes v. United States*, 262 F.3d 143,145-46 (2d Cir. 2001); *In re Turner*, 267 F.3d 225, 227-30 (3d Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir.), *cert. denied*, 122 S.Ct. 573 (2001); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000); *In re Clemmons*, 259 F.3d 489, 493 (6th Cir. 2001); *Talbott v. Indiana*, 226 F.3d 866, 868-70(7th Cir. 2000); *Rodgers v. United States*, 229 F.3d 704, 706 (8th Cir.2000); *Jones v. Smith*, 231 F.3d 1227, 1236-38 (9th Cir. 2000); *Browning v. United States*, 241 F.3d 1262, 1266 (10th Cir. 2001); *In re Joshua*, 224 F.3d 1281, 1283 (11th Cir. 2000).

not be subject to the 85% parole ineligibility term unless he in fact used or threatened the use of that firearm. *Johnson*, 166 N.J. at 545-46, 766 A.2d at 1139. As noted, the Supreme Court of New Jersey construed NERA as requiring the jury, not the judge, to determine whether the crime was violent.

The New Jersey Legislature's response to the *Johnson* decision was to rewrite NERA so that enumerated first- and second degree offenses are NERA crimes subject to 85% mandatory minimum sentencing, without regard to whether the actor actually caused death or serious bodily injury, whether the crime actually involved the use or threatened use of a deadly weapon, or whether during any aggravated sexual assault or sexual assault the actor actually used, or threatened the immediate use of, physical force. N.J.Stat.Ann. § 2C:43-7.2 (1997 N.J. Laws c. 117, § 2, eff. June 9, 1997, amended by 2001 N.J. Laws c. 129, § 1, eff. June 29, 2001). The sentencing courts' discretion under NERA is now limited solely to the maximum sentence imposed, within prescribed statutory guidelines. It is convicted criminals who thus stand to lose when sentencing courts are no longer authorized to make individualized findings regarding the suitability of mandatory minimum terms.

In sum, this Court should continue to "reject[] the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the state must prove that fact beyond a reasonable doubt." *McMillan*, 477 U.S. at 84 (quoting *Patterson v. New York*, 432 U.S. 197, 214 (1977)). The *McMillan* rule is both viable and workable, and has been relied upon by the States to imprison countless criminal defendants. As a matter of practice, repudiation of the *McMillan* rule will prejudice the defense, hamper the prosecution, and unduly tax jurors. It will also cause a flood of collateral petitions for relief in the state and federal courts. *McMillan* is still good law, and the doctrine of *stare decisis* weighs heavily against its reversal.

CONCLUSION

The *amici* States and Territories respectfully urge the Court to affirm the judgment below.

Respectfully submitted,

DAVID SAMSON
Attorney General of New Jersey
Counsel for the *amici* states

LISA SARNOFF GOCHMAN
Deputy Attorney General
Counsel of Record

Dated: February 22, 2002